NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TERRENCE FITZPATRICK Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1409 EDA 2012

Appeal from the PCRA Order April 16, 2012
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0000713-2007

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, J.: Filed: February 1, 2013

Appellant, Terrence Fitzpatrick, appeals from the order entered in the Northampton County Court of Common Pleas, dismissing his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

The relevant facts and procedural history of this appeal are as follows.

> [Appellant] and [Co-Defendant] were tried together and each was convicted, on March 13, 2008, of two counts of attempted murder, two counts of aggravated assault, conspiracy to commit murder, conspiracy to commit aggravated assault, and firearms not to be carried without a license. On June 9, 2008, [Appellant] was sentenced to twenty to forty years on the first count of attempted murder and a concurrent term of nine to eighteen years on the second attempted murder count. [Appellant] was also sentenced to concurrent terms of [nine] to [eighteen] years for conspiracy to commit criminal homicide, four to

[1] 42 Pa.C.S.A. §§ 9541-9546.

> eight years for conspiracy to commit aggravated assault, and [four] to [eight] years for carrying a firearm without a license, for an aggregate sentence of twenty to forty years in state prison.
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> [Appellant] filed Post-Sentence Motions, which the Court denied in an Order filed on October 16, 2008. [Appellant] filed an appeal to the Superior Court from that Order and, on March 8, 2010, the Superior Court affirmed the sentence of [the trial court]. [Appellant] thereafter filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on August 31, 2010.

(PCRA Court Opinion, filed July 9, 2012, at 1-2).

Appellant timely filed a *pro se* PCRA petition on October 31, 2011. The court appointed counsel, who filed a "no-merit" letter on March 23, 2012. That same day, the court issued notice of its intent to dismiss the petition without a hearing, pursuant to Pa.R.Crim.P. 907. Appellant did not respond to the Rule 907 notice. On April 16, 2012, the court denied PCRA relief and permitted counsel to withdraw.

Appellant timely filed a *pro se* notice of appeal on May 8, 2012. On May 11, 2012, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a *pro se* Rule 1925(b) statement on June 1, 2012.

Appellant raises four issues for our review:

> WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO BRIEF AND PRESERVE APPELLANT'S RIGHT FOR RECONSIDERATION OF SENTENCE?
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> WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO REQUEST A CHANGE OF VENUE, WHERE LOCAL MEDIA...PUBLISHED ARTICLES OF "GANG AFFILIATION?"

> WAS COUNSEL INEFFECTIVE FOR FAILING TO INVESTIGATE THE CRIME SCENE FOR POTENTIAL BENEFICIAL EXCULPATORY EVIDENCE SUPPORTING A MERITORIOUS DEFENSE?
>
> WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO TAKE A MISTRIAL?

(Appellant's Brief at 1).

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007).

In his first issue, Appellant contends the counseled post-sentence motions did not emphasize the non-violent nature of Appellant's prior criminal record. Likewise, Appellant complains trial counsel failed to interject when the sentencing court considered Appellant's past "delinquent" activities in formulating the current sentence. Appellant asserts trial counsel should have emphasized the non-violent nature of the criminal record, because this factor alone justified the imposition of a lesser sentence. Appellant insists trial counsel had no reasonable basis for failing to raise the claim in the post-sentence motions or at sentencing, and trial counsel's

omission resulted in an excessive term of imprisonment. Appellant concludes counsel was ineffective on this basis. We disagree.

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Williams***, 597 Pa. 109, 950 A.2d 294 (2008). When asserting a claim of ineffective assistance of counsel, the petitioner is required to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and, (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. ***Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326 (1999). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Williams, supra***.

"The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit…." ***Commonwealth v. Pierce***, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004).

> Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective.

Pierce, supra at 524, 645 A.2d at 194-95 (internal citations omitted).

> Prejudice is established when [a defendant] demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In [***Kimball, supra***], we held that a "criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Commonwealth v. Chambers, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002) (some internal citations and quotation marks omitted).

Where the sentencing court had the benefit of a pre-sentence investigation ("PSI") report, the law presumes that the court was aware of and weighed relevant information regarding a defendant's character and any mitigating factors. ***Commonwealth v. Tirado***, 870 A.2d 362 (Pa.Super. 2005). Further, the combination of PSI and standard range sentence, absent more, cannot be considered excessive or unreasonable. ***Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 545 (Pa.Super. 1995), *appeal denied*, 544 Pa. 653, 676 A.2d 1195 (1996).

Instantly, the court sentenced Appellant to an aggregate term of twenty (20) to forty (40) years' imprisonment, with all sentences imposed concurrent to the sentence for the first count of attempted murder. The PCRA court explained that Appellant received a standard range sentence for the first attempted murder conviction:

> With respect to [Appellant's] sentence on the first count of attempted murder, the most serious charge, the offense

> gravity score was fourteen, and [Appellant] had a prior record score of two, making the standard minimum sentence guideline range, pursuant to the deadly weapon used matrix, 114 months to twenty years. ***See*** 204 Pa.Code § 303.18. As the Court imposed a sentence of twenty to forty years for that offense, which was the aggregate sentence as well, the [c]ourt's sentence fell within the standard range of sentencing guidelines.

(***See*** PCRA Court Opinion at 6.) As the court had the benefit of a PSI report, the sentence was presumptively valid. ***See Cruz-Centeno, supra***. Moreover, the PSI report informed the court of any mitigating factors. ***See Tirado, supra***. Thus, counsel was not ineffective for failing to pursue a baseless sentencing claim. ***See Poplawski, supra***.

In his second issue, Appellant complains that local newspapers ran headlines referring to his "gang affiliation" on the day when jury selection commenced. Appellant contends the reference to gang activity constituted inherently prejudicial pretrial publicity. Moreover, Appellant asserts that three of the venirepersons selected for the jury admitted exposure to the pretrial publicity; thus, the publicity had effectively saturated the community. Under these circumstances, Appellant concludes counsel was ineffective for failing to request a change of venue. We disagree.

"The mere existence of pretrial publicity does not warrant a presumption of prejudice." ***Commonwealth v. Birdsong***, 611 Pa. 203, ___, 24 A.3d 319, 331 (2011).

> [O]ur inquiry must focus upon whether any juror formed a fixed opinion of the defendant's guilt or innocence as a result of the pre-trial publicity. Pre-trial publicity will be

> deemed inherently prejudicial where the publicity is sensational, inflammatory, slanted towards conviction rather than factual and objective; revealed that the accused had a criminal record; referred to confessions, admissions or reenactments of the crime by the accused; or derived from reports from the police and prosecuting officers.
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> * * *
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> If any of these factors exists, the publicity is deemed to be inherently prejudicial, and we must inquire whether the publicity has been so extensive, so sustained, and so pervasive that the community must be deemed to have been saturated with it. Finally, even if there has been inherently prejudicial publicity which has saturated the community, no change of venue is warranted if the passage of time has sufficiently dissipated the prejudicial effects of the publicity.

Id. at ___, 24 A.3d at 331-32 (internal citations omitted).

"[A] court must investigate what a panel of prospective jurors has said about its exposure to the publicity in question." ***Commonwealth v. Briggs***, 608 Pa. 430, 468, 12 A.3d 291, 314 (2011), *cert. denied*, ___ U.S. ___, 132 S.Ct. 267, 181 L.Ed.2d 157 (2011) (quoting ***Commonwealth v. Robinson***, 581 Pa. 154, 195, 864 A.2d 460, 484 (2004), *cert. denied*, 546 U.S. 983, 126 S.Ct. 559, 163 L.Ed.2d 470 (2005)).

> This is one indication of whether the cooling period has been sufficient. Thus, in determining the efficacy of the cooling period, a court will consider the direct effects of publicity, something a defendant need not allege or prove. Although it is conceivable that pretrial publicity could be so extremely damaging that a court might order a change of venue no matter what the prospective jurors said about their ability to hear the case fairly and without bias, that would be a most unusual case. Normally, what prospective jurors tell us about their ability to be impartial

> will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective. The discretion of the trial judge is given wide latitude in this area.

Briggs, supra at 468-69, 12 A.3d at 314 (quoting ***Robinson, supra*** at 195-96, 864 A.2d at 484).

Instantly, the PCRA court evaluated the pretrial publicity as follows:

> Here, only twelve out of forty-five venirepersons had been exposed to media coverage of this case prior to *voir dire*. Only two of the venirepersons who were exposed to media coverage stated that their exposure would affect their ability to serve as a fair and impartial juror on the case. Both of those potential jurors were stricken for cause. Additionally, the Commonwealth used a peremptory challenge to strike one of the venirepersons exposed to media coverage because that person knew [Appellant] and Co-Defendant. Moreover, only three of the twelve venirepersons selected as regular jurors had been exposed to any media coverage of the case. As such, [trial counsel] had no basis to argue either that actual prejudice existed or that the media coverage had pervaded the jury pool.

(***See*** PCRA Court Opinion at 8-9) (internal citations to the record omitted). After reviewing the *voir dire* transcript, we agree that Appellant would not have been entitled to a change of venue. ***See Briggs, supra***. Therefore, counsel was not ineffective on this basis. ***See Poplawski, supra***.

In his third issue, Appellant asserts trial counsel was ineffective for failing to introduce allegedly exculpatory evidence. Specifically, Appellant maintains that trial counsel investigated the crime scene, discovered favorable evidence, and failed to introduce it at trial. In the *pro se* PCRA petition, however, Appellant asserted that trial counsel did not conduct any

investigation of the crime scene. Appellant now attempts to argue that the two issues are related. (***See*** Appellant's Brief at 9-10.) Nevertheless, the PCRA court correctly recognized the "drastic" dichotomy between Appellant's competing theories. (***See*** PCRA Court Opinion at 11.) In his fourth issue, Appellant asserts trial counsel was ineffective for failing to move for a mistrial after an unfavorable evidentiary ruling. Appellant, however, waived both of these issues by failing to raise them in his PCRA petition. ***See Commonwealth v. Lauro***, 819 A.2d 100, 103 (Pa.Super. 2003), *appeal denied*, 574 Pa. 752, 830 A.2d 975 (2003). (stating: "Issues not raised in a PCRA petition cannot be considered on appeal"). Accordingly, we affirm the order denying PCRA relief.

Order affirmed.