NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLYVANIA, Appellee v. TODD ALLEN YOHE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1441 MDA 2012

Appeal from the Order entered July 11, 2012,
in the Court of Common Pleas of Dauphin County,
Criminal Division, at No(s): CP-22-CR-0003089-2008.

BEFORE: DONOHUE, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.: Filed: March 15, 2013

Todd Allen Yohe ("Appellant") appeals from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. sections 9541-9546. We affirm.

The pertinent facts and procedural history have been summarized as follows:

> The record reflects that on July 31, 2007, Appellant, along with co-conspirators Michael Lyter, Stephen Alfera, and Nathan Bell, were present at Appellant's apartment. At some point during the evening, Appellant, who allegedly did not have a license to drive, asked Alfera to drive Lyter, in Appellant's vehicle, to Harrisburg to buy marijuana from the victim, a known drug dealer. Alfera testified at trial that he drove Lyter to Harrisburg, parked and watched as Lyter went into an apartment for 15-20 minutes, exited the apartment, and disappeared from view for approximately one hour before he returned to the car all "jumpy and antsy." Trial Court Opinion, 5/24/10, at 3. The men then returned to Appellant's apartment, and Lyter

gave Alfera the "half-pound of marijuana, or about $800 to $900 worth" he had obtained from the victim. ***Id.***

The victim was found dead in the entryway to his apartment in the early morning hours of August 1, 2007, shot between the eyes execution style. Through phone records and interviews with people that knew the victim planned to sell drugs to Lyter on the night of July 31, 2007, the police were led to Appellant and his [co-conspirators], all of whom were ultimately arrested and charged in connection with [the victim's] murder.

On August 4, 2007, Appellant gave a statement to police wherein he claimed that Lyter had told him he had gotten into a confrontation with a drug dealer in Harrisburg who had tried to rob him, and that [Lyter] had shot the dealer in the head. During the two-day trial ending on November 17, 2009, co-conspirator Bell testified that he had seen the .25 caliber gun used in the crime, that he had heard Appellant and Lyter talking about a $1,000.00 debt the victim owed Lyter, and that on the day of the murder, Lyter had paid Appellant money and/or marijuana for allowing Lyter to use his car. These statements were corroborated by the trial testimony of Gerald Smith, an inmate who had been incarcerated with Appellant in July 2008. At trial, Smith testified that [Appellant] had told him that he had "set up a robbery of a marijuana dealer that went bad and someone got killed in the robbery." ***Id.*** at 6. "[Appellant] told Smith that guys named Steve (Alfera), Nate (Bell) and Mike (Lyter) were trying to pin the murder on him and that he was particularly worried about [Lyter] since he had given [Lyter] a .25 caliber pistol to commit the robbery." ***Id.***

Following the jury trial, Appellant was convicted of second[-]degree murder, robbery and conspiracy. Appellant was sentenced on November 18, 2009 [to life imprisonment for second-degree murder, a concurrent term of four to eight years' imprisonment for robbery, and a consecutive term of three to six years' imprisonment for conspiracy.] [N]o post-sentence motions were filed.

Commonwealth v. Yohe, 6 A.3d 559 (Pa. Super. 2010), unpublished memorandum at 1-2.

Appellant filed a timely appeal to this Court, in which he raised a challenge to the sufficiency of the evidence supporting his convictions, and two claims of trial court error involving his unsuccessful attempt to preclude the Commonwealth from introducing statements from two co-conspirators. ***Yohe***, unpublished memorandum at 3-4. Specifically, prior to trial Appellant filed a motion to have Bell declared incompetent to testify, and to exclude any and all statements of Lyter, a non-testifying co-conspirator. ***Id.*** at 12. Rejecting these claims, this Court, on July 13, 2010, affirmed Appellant's judgment of sentence. Appellant did not file a petition for allowance of appeal with our Supreme Court.

Appellant filed a *pro se* PCRA petition on August 5, 2011, The PCRA court appointed counsel, and PCRA counsel filed an amended PCRA petition on October 28, 2011. The PCRA court held an evidentiary hearing on January 12, 2012, and took the matter under advisement. By order entered July 12, 2012, the PCRA court denied Appellant's petition. This appeal followed. The PCRA court did not require Pa.R.A.P. 1925 compliance.

Appellant raises the following issue on appeal:

> Did the PCRA court err in denying Appellant's [PCRA petition] due to ineffective assistance of counsel where trial counsel failed to speak with Appellant's co-defendant, [Lyter], about testifying at trial, when trial counsel was aware of the exculpatory nature of his potential testimony?

Appellant's Brief at 5 (emphasis removed).

In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). We pay great deference to the findings of the PCRA court, "but its legal determinations are subject to our plenary review." ***Id.*** Furthermore, to be entitled to relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the errors enumerated in section 9543(a)(2) of the PCRA. One such error involves the ineffectiveness of counsel.

To obtain relief under the PCRA premised on a claim that counsel was ineffective, a petitioner must establish by a preponderance of the evidence that counsel's ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. ***Johnson***, 966 A.2d at 532. "Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner." ***Id.*** This requires the petitioner to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) petitioner was prejudiced by counsel's act or omission. ***Id.*** at 533. A finding of "prejudice" requires the petitioner to show "that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***

Counsel will not be deemed ineffective if any reasonable basis exists for counsel's actions. ***Commonwealth v. Douglas***, 645 A.2d 226, 231 (Pa. 1994). Even if counsel had no reasonable basis for the course of conduct pursued, an appellant is not entitled to relief if he fails to demonstrate the requisite prejudice which is necessary under Pennsylvania's ineffectiveness standard. ***Douglas***, 645 A.2d at 232. Counsel cannot be deemed ineffective for failing to pursue a meritless claim. ***Commonwealth v. Loner***, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*), *appeal denied*, 852 A.2d 311 (Pa. 2004).

Moreover, trial counsel's strategic decisions cannot be the subject of a finding of ineffectiveness if the decision to follow a particular course of action was reasonably based and was not the result of sloth or ignorance of available alternatives. ***Commonwealth v. Collins***, 545 A.2d 882, 886 (Pa. 1988) (cited with approval by ***Commonwealth v. Hall***, 701 A.2d 190, 204 (Pa. 1997)). Counsel's approach must be "so unreasonable that no competent lawyer would have chosen it." ***Commonwealth v. Ervin***, 766 A.2d 859, 862-63 (Pa. Super. 2000) (quoting ***Commonwealth v. Miller***, 431 A.2d 233, 234 (Pa. 1981)). Our Supreme Court has defined "reasonableness" as follows:

> Our inquiry ceases and counsel's assistance is deemed constitutionally effective once we are able to conclude that

> the particular course chosen by counsel had *some reasonable* basis designed to effectuate his client's interests. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis.

Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987) (quoting ***Com. ex rel. Washington v. Maroney***, 235 A.2d 349, 352-53 (Pa. 1967)). ***See also Commonwealth v. Clark***, 626 A.2d 154, 157 (Pa. 1993) (explaining that a defendant asserting ineffectiveness based upon trial strategy must demonstrate that the "alternatives not chosen offered a potential for success substantially greater than the tactics utilized"). A defendant is not entitled to appellate relief simply because a chosen strategy is unsuccessful. ***Commonwealth v. Buksa***, 655 A.2d 576, 582 (Pa. Super. 1995).

Appellant claims that trial counsel "was ineffective for failing to contact potential witness, [Lyter], despite the fact that Appellant indicated to trial counsel that [Lyter] would testify in a manner favorable to Appellant and provide exculpatory testimony on his behalf." Appellant's Brief at 12. We disagree.

This Court has recently stated:

> A defense counsel's failure to call a particular witness to testify does not constitute ineffectiveness *per se*. ***Commonwealth v. Cox***, 603 Pa. 223, 267, 983 A.2d 666, 693 (2009) (citation omitted). "In establishing whether defense counsel was ineffective for failing to call witnesses, a defendant must prove the witnesses existed, the witnesses were ready and willing to testify, and the

> absence of the witnesses' testimony prejudiced petitioner and denied him a fair trial." ***Id.*** at 268, 983 A.2d at 693.

Commonwealth v. Johnson, 27 A.3d 244, 247 (Pa. Super. 2011).

In concluding that Appellant's issue lacked merit, the PCRA court explained:

> The credible evidence presented at the PCRA hearing was that Lyter was not available and thus, this claim lacks arguable merit. Nine months prior to [Appellant's] trial, Lyter had been tried and convicted in this court of the first degree murder of Dax Curtis. Lyter had not testified at his own trial. At the time of [Appellant's] trial in November 2009, Lyter had an appeal pending before the Superior Court in which he challenged both the weight and the sufficiency of the evidence upon which he was convicted. [Lyter's appeal was later denied by the Superior Court.] As such, he was actively represented by [counsel]. [Trial counsel], who was aware of Lyter and his involvement in the murder, testified at the PCRA hearing that she inquired of [Lyter's counsel] as to Lyter's availability to testify. She was advised he was not available. This was credible testimony. In any event, it is almost inconceivable in this court's opinion that Lyter's attorney would have advised him to waive his right against self-incrimination and subject him to questioning, or that Lyter would have agreed to such, knowing that anything he said at [Appellant's] trial could be used against him in the future and thus jeopardize any chance Lyter had of escaping his mandatory life sentence. Lyter's testimony at the PCRA hearing that he would have eagerly implicated himself by testifying on [Appellant's] behalf (that it was Nathan Bell and not [Appellant] who provided Lyter with the gun) was not credible.
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> Even were this court to find this issue of arguable merit, i.e. that Lyter was available to testify for [Appellant], [trial counsel] offered numerous valid reasons that her decision not to call Lyter was reasonably designed to effectuate [Appellant's] interests. [Trial counsel] testified that she would not have offered Lyter as a witness because there were too many conflicting statements as between Lyter,

> [Appellant] and the two other co-conspirators (Bell and Alfera) regarding the murder. In addition, Lyter was a good friend of [Appellant's] and the jury would have found him biased.

PCRA Court Opinion, 7/11/12, at 4 (citation omitted). Our review of the record supports the PCRA court's conclusions.

Initially, we cannot disturb the PCRA court's credibility determinations. ***See Commonwealth v. Harmon***, 738 A.2d 1023, 1025 (Pa. Super. 1999) (explaining that when a PCRA court's determination of credibility is supported by the record, it cannot be disturbed on appeal). Our review of the PCRA hearing transcript refutes Appellant's assertion that the PCRA court relied upon hearsay testimony when making its ruling. At the hearing, the parties stipulated that Lyter's counsel informed PCRA counsel that he had advised Lyter not to testify at Appellant's trial. ***See*** N.T., 1/19/12, at 45-46. Appellant argues that even if Lyter's counsel advised him not to testify on Appellant's behalf, "it was still the responsibility of trial counsel to investigate Lyter as a potential witness due to the exculpatory nature of his probable testimony." Appellant's Brief at 19. In support of this claim, Appellant asserts that trial counsel "had a duty to seek an order of Court and/or a subpoena to speak with Lyter in order to determine whether he would testify in the exculpatory manner as expected by Appellant." Appellant cites no case authority to establish that trial counsel's failure to

seek a court order was unreasonable.[1] Thus, we find the trial court correctly found that Lyter was unavailable as a witness at Appellant's trial.

Our review of the record also supports the trial court's conclusion that Appellant was unable to prove that he was prejudiced by the absence of Lyter's testimony. As noted above, trial counsel sought unsuccessfully to exclude all references to Lyter's statements at trial because he was not going to be called as a witness. As trial counsel noted in arguing her motions, "the statements given by all the parties disproportionately implicate [Lyter.]" N.T., 11/16/09, at 12. Had Lyter testified at trial, he would have been impeached by the prior statements of the other co-conspirators, including his own statements to authorities. ***See*** N.T., 1/19/12, at 48 (explaining "when you compare . . . all four [co-]defendants' statements against each other, there were just way too many problems that could arise by having [Lyter] testify"). Thus, the PCRA court accepted as reasonable trial counsel's testimony that, as a matter of trial strategy, she would not have called Lyter even if he was available. Our review of the record supports the PCRA court's conclusion.

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[1] Appellant also argues that Lyter's testimony constitutes after-discovered evidence under the PCRA. ***See*** 42 Pa.C.S.A. § 9543(a)(2)(vi). Because Appellant did not seek relief on this basis in his amended PCRA petition, we may not consider this claim.

In sum, because Appellant has not demonstrated that trial counsel was ineffective or that the PCRA court erred, we affirm the PCRA court's order dismissing his PCRA petition.

Order affirmed.