NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RAMONE BROWN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1472 WDA 2012

Appeal from the PCRA Order September 14, 2012
In the Court of Common Pleas of Blair County
Criminal Division at No.: CP-07-CR-0000703-2007

BEFORE: DONOHUE, J., MUNDY, J., and PLATT, J.*

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

Appellant, Ramone Brown, appeals from the Order of September 14, 2012, denying, after an evidentiary hearing, his first, counseled petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. For the reasons discussed below, we affirm.

On March 13, 2009, a jury convicted Appellant of possession with intent to deliver a controlled substance (PWID) and possession of a controlled substance. The conviction arose from a January 28, 2007 automobile stop, wherein Appellant was found in possession of a baggie containing containers of crack cocaine. On May 15, 2009, the trial court sentenced Appellant to not less than five nor more than ten years of

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* Retired Senior Judge assigned to the Superior Court.

incarceration to be followed by ten years of probation consecutive to parole. This Court affirmed the judgment of sentence on March 1, 2011. (***See Commonwealth v. Brown***, 26 A.3d 1175 (Pa. Super. 2011) (unpublished memorandum). Appellant did not seek leave to appeal to the Pennsylvania Supreme Court.

On August 16, 2011, Appellant, acting *pro se*, filed the instant, timely PCRA petition. The PCRA court appointed counsel, who ultimately filed an amended PCRA petition. The PCRA court held an evidentiary hearing on August 14, 2012. On September 14, 2012, the PCRA court denied the PCRA petition. The instant, timely appeal followed.[1]

On appeal, Appellant raises the following issues for our review:

> 1. The [PCRA] [c]ourt erred in finding that the Appellant's prior counsel was not ineffective in failing to obtain a proper expert witness.
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> 2. The [PCRA] [c]ourt erred in finding that the Appellant's prior counsel was not ineffective in failing to object to the Commonwealth witness testimony of Agent Feathers.
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> 3. The [PCRA] [c]ourt erred in finding that the Appellant's prior counsel was not ineffective in failing to request a Motion for Independent Weighing at sentencing.

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[1] Appellant filed a timely concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). The PCRA court issued a 1925(a) opinion. ***See*** Pa.R.A.P. 1925.

4. The [PCRA] [c]ourt erred in finding that the Appellant's prior counsel was not ineffective in failing to preserve all of the Appellant's issues for appellate review.

(Appellant's Brief, at 3).

We review a denial of a post-conviction petition to determine whether the record supports the PCRA court's findings and whether its order is otherwise free of legal error. ***See Commonwealth v. Faulk***, 21 A.3d 1196, 1199 (Pa. Super. 2011), *appeal denied*, 2011 Pa. Lexis 3041 (Pa. 2011). To be eligible for relief pursuant to the PCRA, an appellant must establish, *inter alia*, that his conviction or sentence resulted from one or more of the enumerated errors or defects found in 42 Pa.C.S.A. § 9543(a)(2). He must also establish that the issues raised in the PCRA petition have not been previously litigated or waived. ***See*** 42 Pa.C.S.A. § 9543(a)(3). An allegation of error "is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." ***Id.*** at § 9544(b).

Appellant claims that he received ineffective assistance of counsel during trial and on appeal. (***See*** Appellant's Brief, at 6). Counsel is presumed effective, and Appellant bears the burden to prove otherwise. The test for ineffective assistance of counsel is the same under both the Federal and Pennsylvania Constitutions. ***See Strickland v. Washington***, 466 U.S. 668 (1984); ***Commonwealth v. Jones***, 815 A.2d 598, 611 (Pa. 2002). Appellant must demonstrate that: (1) his 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 interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. ***See Commonwealth v. Pierce***, 786 A.2d 203, 213 (Pa. 2001), *abrogated on other grounds by* ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002). A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. ***See Jones***, ***supra*** at 611.

In his first claim, Appellant alleges that trial counsel was ineffective for failing to obtain a "proper expert witness" to refute the Commonwealth's contention that the cocaine was for sale rather than Appellant's personal use. (Appellant's Brief, at 7). The PCRA court stated in its 1925(a) opinion that,

> [Appellant]'s expert was Raoul Rapneth who was a retired Pittsburgh police officer with 30 years of experience. During his 30 years of service Mr. Rapneth had two years of experience as a uniformed officer making narcotics arrests. He also had twelve years in the plain clothes section during which he attended classes and seminars dealing with narcotics investigation. Mr. Rapneth then became a detective and spent 19 years in the narcotics unit. Mr. Rapneth had been qualified as an expert over a thousand times by his estimate dating back to the mid-1970s. Mr. Rapneth testified favorably for [Appellant].
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> [Appellant]'s trial counsel, Attorney Passerello, also testified that he discussed the retention of Mr. Rapneth with [Appellant]. Attorney Passarello had consulted with other attorneys who had used Mr. Rapneth as an expert prior to retaining him.

(PCRA Court Opinion, 10/11/12, at 1-2) (record citations omitted). Despite this, Appellant argues that Mr. Rapneth was not a "proper" expert because he lacked familiarity with Blair County. (Appellant's Brief, at 7-8).

It is settled that when a defendant claims that counsel was ineffective for failing to introduce some sort of expert testimony at trial, he must articulate, "what evidence was available and identify a witness who was willing to offer such [evidence]." ***Commonwealth v. Gwynn***, 943 A.2d 940, 945 (Pa. 2008) (citations omitted). Appellant has not done so; therefore, this claim must fail. ***See id.***

In any event, the argument section of Appellant's brief addressing this issue violates the requirements of the Pennsylvania Rules of Appellate Procedure. (***See*** Appellant's Brief, at 7-8). Pursuant to Pennsylvania Rule of Appellate Procedure 2119(a), an appellant's brief must contain "such discussion and citation of authorities as are deemed pertinent." Pa.R.A.P. 2119(a); ***see also*** Pa.R.A.P. 2119(b). However, Appellant's brief contains only boilerplate law on the standard of review for ineffective assistance of counsel for failure to call witnesses. (***See*** Appellant's Brief, at 7-8). Appellant's argument regarding the specifics of his claim consists of a single conclusory paragraph, devoid of citations to the record and to any relevant legal authority. Therefore, this issue is waived.

Moreover, the issue lacks merit. Mr. Rapneth testified regarding the issue of possession with intent to deliver versus possession for personal use.

(***See*** N.T. Trial, 3/13/09, at 48). Appellant has not provided any support for a claim that there were such marked differences between the drug trade in Pittsburgh and the drug trade in Blair County that made it impossible for Mr. Rapneth to testify credibly regarding possession for personal use versus possession with intent to deliver and has not pointed to any testimony by Mr. Rapneth that prejudiced him. Further, at the PCRA hearing, Appellant admitted that he had agreed to hire Mr. Rapneth and never requested that counsel hire a "local" expert. (N.T. PCRA Hearing, 8/14/12, at 33, 44). Based upon the foregoing, Appellant has not shown that trial counsel was ineffective for failing to hire a "proper" expert witness. The claim lacks merit.

In his second claim, Appellant argues that trial counsel was ineffective for failing to object to the testimony of Commonwealth expert witness Agent Randy Feathers. (***See*** Appellant's Brief, at 9-10). Appellant alleges that Agent Feathers was biased against him because of his involvement in a prior unsuccessful prosecution of Appellant. (***See id.*** at 9).

Preliminarily, we note that the argument section of Appellant's brief on this issue does not contain any pertinent citation to authority and discussion, or references to the record. (***See id.*** at 9-10); ***see also*** Pa.R.A.P. 2117(c); Pa.R.A.P. 2119(a)-(c); ***Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa. Super. 2007), *appeal denied*, 982 A.2d 509 (Pa. 2007) (noting that this

Court will not "scour the record to find evidence to support an argument[.]"). Accordingly, we deem this issue waived.

Moreover, to the extent that the issue can be reviewed, it would not merit relief. There is no evidence that Agent Feathers had any personal animus against Appellant. When asked at the evidentiary hearing regarding any alleged bias, Appellant's testimony was equivocal, initially beginning to state that he did not believe that Agent Feathers was biased against him and then calling it a "sort of a bias." (***See*** N.T. PCRA Hearing, 8/14/12, at 34). Appellant did not provide any support for his contention at the evidentiary hearing that Agent Feathers was "a little bitter" about the earlier prosecution or that Agent Feathers had volunteered to testify in the instant matter to "settle a score" with Appellant. (***See id.*** at 35). Further, trial counsel testified that he did not believe that there was any basis for Appellant's contention that Agent Feathers was biased, testifying that Appellant disliked all law enforcement and believed that all law enforcement was "after him" and "looking to get him." (***Id.*** at 7). Trial counsel further stated that he did not believe that Agent Feathers had a personal vendetta against Appellant but that Agent Feathers was generally used by the Commonwealth as an expert witness and always believed drugs were possessed with an intent to deliver. (***See id.*** 15).

In any event, Appellant has not provided any legal support for his contention that there was a legitimate basis to disqualify Agent Feathers

based upon his prior involvement with Appellant. (***See*** Appellant's Brief, at 9-10). Further, Appellant does not point to, and our review of Agent Feather's testimony does not show any evidence of bias against Appellant. (***See*** N.T. Trial, 3/12/09, at 167-221). Lastly, Appellant has not demonstrated that, even if trial counsel had objected to Agent Feather's testifying as an expert witness, the result would have been different, as the Commonwealth would have simply substituted a different expert witness. Appellant's claim that trial counsel was ineffective for failing to object to Agent Feather's testifying as an expert witness lacks merit.

In his third claim, Appellant contends that trial counsel was ineffective for failing to renew a motion for an independent weighing at sentencing. (***See*** Appellant's Brief, at 11-12). As an initial matter, we note that Appellant's argument on this issue suffers from the same fatal flaws as the arguments on his first two issues, therefore, it is waived. (***See id.***); ***see also*** Pa.R.A.P. 2117(c); Pa.R.A.P. 2119(a)-(c); ***Beshore***, ***supra*** at 1140.

Moreover, the claim lacks merit. The record reflects that trial counsel initially moved pre-trial for an independent weighing of the cocaine in Appellant's possession at the time of arrest but the motion was denied as premature. (***See*** PCRA Court Opinion, 9/13/12, at 6). Appellant argues that had trial counsel renewed the motion for an independent weighing at sentencing, an independent test would have proved the drugs in question did not weigh over ten grams, thus negating the mandatory sentence, and,

somehow "disputing the Commonwealth's contention that the Appellant had an intent to deliver." (Appellant's Brief, at 11).

Firstly, Appellant has not provided any evidentiary support for his assumption that an independent weighing would have resulted in a lesser weight. (***See*** Appellant's Brief, at 11-12; ***see also*** N.T. PCRA Hearing, 8/14/12, at 15-17). Secondly, Appellant has not explained how a reweighing would have somehow negated his conviction for PWID. (***See id.***). Appellant has not pointed to any record support for a claim that his PWID conviction was solely based upon the weight of the drugs, and our review of the testimony of the Commonwealth's expert demonstrates that he discussed multiple reasons for his conclusion that Appellant intended to distribute the drugs. (***See*** N.T. Trial, 3/12/09, at 178-216). Lastly, Appellant has failed to demonstrate that a reweighing would have resulted in a lesser sentence. (***See*** Appellant's Brief, at 11-12). Even assuming, *arguendo*, that a reweighing would have resulted in a weight of less than ten grams, thus negating the mandatory minimum sentence, the record demonstrates that this would have resulted in a greater, not a lesser sentence. The record reflects that Appellant had a significant prior criminal record and that the pre-sentence investigator recommended a sentence in the aggravated range with a minimum sentence of sixty-one months, one month more than the sentence being served by Appellant. (***See*** N.T. PCRA Hearing, 8/14/12, at 24-26; ***see also*** (PCRA Ct. Op., 10/11/12, at 4-5).

Further, in its sentencing order, the sentencing court specifically stated that if the Commonwealth had not sought the mandatory minimum sentence, the sentencing court would have sentenced Appellant to the recommended aggravated range sentence. (***See*** Sentencing Order, 5/28/09, at 2-3). Thus, Appellant has not shown that the result would have been different if trial counsel had moved for an independent weighing. His third claim lacks merit.

In his fourth and final claim, Appellant argues that appellate counsel was ineffective for failing to pursue the weight of the evidence claim raised in his 1925(b) statement on direct appeal. (***See*** Appellant's Brief, at 12-14). In regard to claims raised in PCRA petitions that appellate counsel was ineffective for failing to raise certain claims on appeal, this Court, relying on both Pennsylvania and United States Supreme Court decisions, has reiterated that neither the Pennsylvania nor the United States Constitution requires appellate counsel "to raise and to argue all colorable, nonfrivolous issues" that a criminal defendant wishes to raise on appeal. ***Commonwealth v. Showers***, 782 A.2d 1010, 1015 (Pa. Super. 2001), *appeal denied*, 814 A.2d 677 (Pa. 2002) (citing ***Jones v. Barnes***, 463 U.S. 745 (1983) for the proposition that expert appellate advocacy consists of the removal of weaker issues and the focus on a few strong issues; and citing ***Commonwealth v. Yocham***, 375 A.2d 325 (Pa. 1977) and

Commonwealth Laboy, 333 A.2d 868, 870 (Pa. 1975) in support of the same view). In ***Showers***, we further stated:

> Effective assistance of counsel on appeal is informed by the exercise of the expertise with which counsel is presumably imbued. It is the obligation of appellate counsel to present issues which, in counsel's professional judgment, "go for the jugular" and do not get lost in a mound of other colorable, nonfrivolous issues which are of lesser merit. Any evaluation of the effectiveness of appellate counsel must strike a balance between the duty to exercise professional judgment to limit the number of issues presented and the duty not to fail to litigate a substantial matter of arguable merit that presents a reasonable probability that a different outcome would have occurred had it been raised by prior counsel. It is the circumstances of the particular case which must guide a court in determining whether the truth-determining process was so undermined by the alleged ineffectiveness that no reliable adjudication of guilt or innocence could have taken place.

Id. at 1016-17 (citations omitted). With this standard in mind, we now address the specifics of Appellant's claims.

Appellant claims that appellate counsel should have challenged the weight of the evidence on direct appeal. However, at Appellant's PCRA hearing, counsel testified that, while he had initially included a weight of the evidence claim on the 1925(b) statement, after further review, he believed that the claim lacked merit and it was better to proceed on more meritorious issues. (***See*** N.T. PCRA Hearing, 8/14/12, at 26-28). We will not find counsel ineffective for engaging in just such a winnowing process as we have discussed approvingly above. Further, Appellant has not shown that had counsel raised a weight of the evidence claim on direct appeal, the result would have been different. To succeed on a challenge to the weight of the

evidence "the evidence must be so tenuous, vague and uncertain that the verdict shocks the consciences of the [C]ourt." ***Commonwealth v. Shaffer***, 722 A.2d 195, 200 (Pa. Super. 1998), *appeal denied*, 739 A.2d 165 (Pa. 1999) (citation omitted). Here, Appellant admitted that he possessed the drugs, thus the sole issue before the jury was whether he possessed them for personal use or for distribution. (***See*** N.T. Trial, 3/12/09, at 24-27). The trial was essentially a "battle of the experts" with each side's expert arguing why certain factors pointed either to possession of the drugs for personal use or possession of the drugs for distribution. (***See*** N.T. Trial, 3/12/09, at 178-216; N.T. Trial, 3/13/09, at 46-91). The jury chose to credit the Commonwealth's expert and to disregard Appellant's expert. The finder-of-fact was free to believe the Commonwealth's witness and disregard Appellant's witness. ***See Commonwealth v. Griscavage***, 517 A.2d 1256, 1259 (Pa. 1986) (the finder of fact is free to believe all, none, or part of the testimony presented at trial). Thus, as Appellant has not shown that raising a weight of evidence claim on direct appeal would have resulted in a different result, his claim lacks merit.

Appellant's claims of ineffective assistance of counsel lack merit. Therefore, the PCRA court did not err in denying Appellant's PCRA petition.

Order affirmed. Jurisdiction relinquished.