

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KINOLL MCCORMICK,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1627 EDA 2011

Appeal from the PCRA Order entered July 2, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0605161-2005

BEFORE: OLSON, OTT and WECHT, JJ.

MEMORANDUM BY OLSON, J.:

Filed: February 12, 2013

Appellant, Kinoll McCormick, appeals *pro se* from the order entered July 2, 2010, dismissing his petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

We summarize the facts and procedural history of this case as follows. A jury convicted Appellant in December 2006 of second-degree murder, robbery, conspiracy and possessing an instrument of crime.¹ The trial court sentenced Appellant to life imprisonment. In April 2008, this Court affirmed the judgment of sentence. ***Commonwealth v. McCormick***, 953 A.2d 834 (Pa. Super. 2008) (unpublished memorandum). The Pennsylvania Supreme

¹ 18 Pa.C.S.A. §§ 2502(b), 3701, 903, and 907, respectively.

Court denied further review. ***Commonwealth v. McCormick***, 962 A.2d 1196 (Pa. 2008).

In July 2009, Appellant filed a timely *pro se* PCRA petition. The PCRA court appointed counsel who filed a “no-merit letter” pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On July 2, 2010, the PCRA court dismissed the PCRA petition and Appellant did not appeal. In November 2010, Appellant filed a petition seeking reinstatement of his appellate PCRA rights and the PCRA court granted the request. This timely appeal followed.²

In its initial Rule 1925(a) opinion, the PCRA court adopted PCRA counsel’s analysis and reasoning as presented in his no-merit letter pursuant to ***Turner/Finley***. This approach has been disapproved by the appellate courts of this Commonwealth. The Pennsylvania Supreme Court “condemned the wholesale adoption of a party’s brief in lieu of filing a PCRA opinion on the grounds that the independent role of the judiciary is not

² Appellant filed a notice of appeal on June 17, 2011. Contemporaneously, Appellant filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Despite already filing a 1925 statement, on June 23, 2011, the PCRA court ordered Appellant to file an additional one. However, the issues presented in the previously filed 1925 statement were properly preserved. ***See Commonwealth v. Snyder***, 870 A.2d 336, 341 (Pa. Super. 2005) (“Appellant filed his [1925] statement contemporaneously with his notice of appeal. Accordingly, there was no need for the trial court to order him to file a 1925(b) statement.”). The PCRA court issued an opinion pursuant to Pa.R.A.P. 1925(a) on November 4, 2011.

properly served absent some autonomous judicial expression of the reasons for dismissing the PCRA petition." *Commonwealth v. Glover*, 738 A.2d 460, 466 (Pa. Super. 1999), citing *Commonwealth v. [Roy] Williams*, 732 A.2d 1167, 1176 (Pa. 1999); see also *Commonwealth v. Fulton*, 876 A.2d 342 (Pa. 2002) (Rule requiring remand for an independent opinion, where the PCRA court adopts counsel's "no merit" letter rather than setting forth its reasons for dismissal in its own opinion, applies equally to non-capital criminal cases). Based on the foregoing, on July 23, 2012, we remanded the matter to the PCRA court for the preparation of a proper Rule 1925(a) opinion, confined only to the issues raised by Appellant in the Rule 1925(b) statement filed contemporaneously with his notice of appeal. The trial court did not comply. Subsequently, we issued orders on November 29, 2012 and January 14, 2013 directing the trial court to respond to our directives. We received a trial court opinion and the certified record on January 15, 2013. The case is now ready for our disposition.

Appellant presents the following *pro se* issues for our review:

- I. Whether or not, both trial counsel and PCRA counsel, rendered ineffective assistance, that caused prejudice in violation of [] Appellant's Sixth Amendment rights?³

³ We note that Appellant sets forth a bald ineffective assistance of counsel claim in his statement of questions presented. However, in the argument section of his brief, Appellant lists and addresses sub-issues. These issues were presented in Appellant's *pro se* PCRA petition, counsel's *Turner/Finley* letter, and the PCRA court's opinion. As such, despite Appellant's briefing deficiency, Appellant properly raised and preserved his ineffective assistance (*Footnote Continued Next Page*)

- II. Did the trial court commit judicial bias, by creating a coercive atmosphere, thus, causing a structural error to occur?⁴

Appellant's Brief at 4 (complete capitalization omitted).

Our standard and scope of review under the PCRA is well-settled:

Under our standard of review for an appeal from the denial of PCRA relief, we must determine whether the ruling of the PCRA court is supported by the record and is free of legal error. The PCRA court's credibility determinations are binding on this Court when they are supported by the record. However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions.

Commonwealth v. Paddy, 15 A.3d 431, 441-442 (Pa. 2011)

The law regarding ineffective assistance of counsel is, as follows:

In Pennsylvania, we begin with the presumption that counsel is effective. In order to overcome this presumption, an appellant must establish three elements: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for his action; and (3) the petitioner was prejudiced by the ineffectiveness. In determining whether

(Footnote Continued) _____

of counsel claims and we are able to address the issues on the merits. **See *Commonwealth v. Clinton***, 683 A.2d 1236, 1239 (Pa. 1996) (when the failure to comply with the Rules of Appellate Procedure does not impede a reviewing court's ability to review the issues, an appellate court may address the merits).

⁴ We find Appellant's claims regarding trial court error waived. An issue is waived if Appellant could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state PCRA proceeding. 42 Pa.C.S.A § 9544(b). Appellant's claims of trial court error are waived pursuant to 42 Pa.C.S.A §§ 9543(a)(3) and 9544(b) and only derivative claims of ineffectiveness for failing to raise the asserted errors are cognizable. ***Commonwealth v. Spatz***, 47 A.3d 63, 124 (Pa. 2012).

counsel's actions were reasonable, we do not question whether there were other more logical courses of action which counsel could have pursued: rather, we must examine whether counsel's decisions had any reasonable basis. Further, in order to establish prejudice, it must be demonstrated that but for the act or omission in question, the outcome of the proceedings would have been different. If a defendant fails to set forth evidence sufficient to meet any of the three elements, his ineffectiveness claim will be denied. Further, we have held that if it is clear that Appellant has not demonstrated that counsel's act or omission adversely affected the outcome of the proceedings, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met. Finally, in a PCRA proceeding, a defendant must establish that the ineffectiveness of counsel was the sort which in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

Commonwealth v. Rios, 920 A.2d 790, 799 (Pa. 2007) (citations, brackets, and quotations omitted).

In his first issue examined,⁵ Appellant argues that trial court was ineffective for failing “to introduce or investigate particular witnesses such as, Aisha McCormick, Davida Hollis, and Tanya Johnson[.]” Appellant’s Brief at 11. Our courts have set forth the procedure by which a petitioner must properly plead and prove his claim that trial counsel was ineffective in failing to call a witness:

In order to prevail on a claim of ineffectiveness for failing to call a witness, a defendant must prove, in addition to meeting the [main ineffectiveness prongs], that: (1) the

⁵ We have reordered Appellant’s issues for ease of discussion.

witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness's testimony was so prejudicial as to have denied him a fair trial.

Further, ineffectiveness 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. [...W]e 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.

Commonwealth v. McLaurin, 45 A.3d 1131, 1137 (Pa. Super. 2012).⁶

Upon review of the certified record, Appellant has not provided any affidavits or signed certifications from the proffered witnesses and, hence, Appellant is not entitled to relief on this claim on this basis alone. Moreover, Appellant does not plead or prove that these witnesses existed, the substance of their proposed testimony, or that they were available and willing to testify on his behalf. Furthermore, in his ***Turner/Finley*** letter to the trial court, PCRA counsel stated that he personally contacted each of the

⁶ We note that case law states an affidavit is required to support an ineffective assistance of counsel claim for failing to call a witness. Moreover, under the PCRA, “[w]here a petitioner requests an evidentiary hearing, the petition shall 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). Here, as discussed ***infra***, Appellant included neither an affidavit nor a signed certification with his PCRA petition.

proposed witnesses and none provided exculpatory information. Trial Court Opinion, 1/10/2013, at 5; **Turner/Finley** letter, 11/4/2011, at 11. Based on the foregoing analysis, there is no arguable merit to Appellant's assertion. Accordingly, we discern no error in the PCRA court's denial of relief on this claim.

Next, Appellant asserts that trial counsel was ineffective for failing to request a mistrial after his co-defendant elected to plead guilty following jury selection. Appellant's Brief at 12. More specifically, Appellant argues that it was error to allow the jury to consider his co-defendant's plea as evidence of guilt by association. *Id.* Moreover, he contends that his right to effective representation was compromised because, in preparing for a joint trial, Appellant ostensibly shared defense strategies with his co-defendant. *Id.* at 15. Hence, when co-defendant opted to plead guilty, the prosecution became privy to those strategies and any additional privileged information Appellant previously shared. *Id.* at 15-16. Appellant maintains that he is entitled to a new trial because there is no way to determine the actual prejudice that resulted. *Id.* at 16-19.

In his **Turner/Finley** letter to the PCRA court, appointed PCRA counsel conceded that this claim had arguable merit. **Turner/Finley** letter, 11/4/2011, at 7. However, counsel stated Appellant could not show prejudice or that, but for counsel's faulty performance, the outcome of the proceeding would have been different. *Id.* Counsel concluded there was overwhelming evidence presented against Appellant at trial, including, *inter*

alia, eyewitness testimony from the victim's mother, inculpatory testimony from Appellant's two cousins, forensic evidence, and Appellant's own trial testimony. ***Id.*** The PCRA court agreed that Appellant could not overcome the prejudice prong of the ineffective assistance of counsel test in order to warrant relief. Trial Court Opinion, 1/10/2013, at 5.

"It is well-settled that guilty pleas of co-defendants cannot be considered as evidence against those who are on trial, because the defendant has a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." ***Commonwealth v. Geho***, 302 A.2d 463, 465-466 (Pa. Super. 1973) (citations, brackets and quotations omitted). "It is incumbent, therefore, upon the trial judge to give adequate and clear cautionary instructions to the jury to avoid guilt by association as to the defendant being tried." ***Id.*** at 466 (quotations omitted). However, when confronted by the same issue presently before us, this Court in ***Commonwealth v. Boyer***, 962 A.2d 1213 (Pa. Super. 2008), recognized that on PCRA review, an appellant must plead and prove a "reasonable probability that the trial outcome would have been different if a [guilt by association] cautionary instruction had been given." ***Boyer***, 962 at 1215. Ultimately, we determined that the appellant in ***Boyer*** was not prejudiced by the lack of an instruction regarding guilt by association because his confession was entered into evidence. ***Id.*** Hence, we deemed counsel effective in that case. ***Id.***

Here, we conclude that there was overwhelming evidence of Appellant's guilt and, therefore, there was no prejudice to Appellant as a result of trial counsel's failure to request an instruction on guilt by association. As we noted on direct appeal, "three witnesses testified to virtually identical accounts implicating McCormick in the robbery of the grocery [store] and his role in the murder of [the victim]." ***Commonwealth v. McCormick***, 953 A.2d 834, at *8 (Pa. Super. 2008) (unpublished memorandum). Appellant's co-defendant testified that Appellant was armed with a .25 caliber weapon and the co-defendant carried a .38 caliber revolver. ***Id.*** at *4. Police recovered a .25 caliber bullet casing from the grocery store and a .38 caliber bullet fragment from the victim. ***Id.*** Moreover, in his appellate brief before us, Appellant concedes "[t]he evidence would show that [he] was indeed in the store at the time of the alleged robbery, and that he fired a .25 caliber hand gun --- 'recklessly' inside the store and then [fled] the scene." Appellant's Brief at 10. Based upon all of the foregoing, we discern no error in the PCRA court's denial of relief on this issue.

Appellant generally argues that counsel's overall representation was presumptively inadequate. Appellant's Brief at 9. As previously stated, however, we begin with the presumption that counsel is effective and Appellant has the duty to prove otherwise. ***McLaurin***, 45 A.3d at 1137. Because Appellant makes only bald allegations that trial counsel failed to challenge the prosecution, this issue must fail.

Finally, Appellant claims that PCRA counsel is ineffective. However, “claims of PCRA counsel ineffectiveness cannot be raised for the first time after a notice of appeal has been taken from the underlying PCRA matter.” ***Commonwealth v. Ford***, 44 A.3d 1190, 1201 (Pa. Super. 2012). This issue is not properly before us.

Appellant has also filed three applications for relief that are pending before us. First, Appellant filed an application for post submission communication. He argued that the United States Supreme Court has determined that it is unconstitutional for juveniles to be sentenced to life imprisonment without the possibility of parole. However, Appellant cannot raise this issue for the first time in the appeal of the dismissal of his first PCRA petition and, hence, we deny the motion. Pa.R.A.P. 302(a). Appellant also filed an application for relief in the form of a contempt order. In that motion, citing our July 23, 2012 memorandum opinion, Appellant maintained that despite directing the PCRA court to file an opinion within 60 days, the PCRA court had not complied. He asked this Court to enter a contempt order. We subsequently entered another order directing compliance and the PCRA court finally complied. Accordingly, no relief is due as the issue is moot. Finally, upon receipt of the PCRA court’s supplemental Rule 1925 opinion, Appellant filed an objection to that opinion in which he argues that the PCRA court misstated the facts. We have independently reviewed the record and addressed the merits of Appellant’s preserved claims. Appellant is not entitled to additional relief.

Order affirmed. Application for leave to file post submission communication denied. Application for relief in the form of a contempt order denied. Application for relief in the form of an objection to the PCRA court's opinion denied.