

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

AARON KELLY,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1659 EDA 2012

Appeal from the PCRA Order of May 25, 2012,  
in the Court of Common Pleas of Philadelphia County,  
Criminal Division at No. CP-51-CR-0107631-2004

BEFORE: OLSON, WECHT and COLVILLE\*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: February 7, 2013

This is an appeal from an order dismissing Appellant's petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

The background underlying this matter can be summarized in the following manner. Appellant was arrested and charged with the murder of Steven Clark. The trial court convicted Appellant of, *inter alia*, first-degree murder and sentenced him to life in prison. This Court affirmed the judgment of sentence. ***Commonwealth v. Kelly***, 959 A.2d 967 (Pa. Super. 2008) (unpublished memorandum). Appellant filed a petition for allowance of appeal in our Supreme Court, which was denied on December 3, 2008. ***Commonwealth v. Kelly***, 962 A.2d 1196 (Pa. 2008).

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\*Retired Senior Judge assigned to the Superior Court.

On May 13, 2009, Appellant timely filed a PCRA petition. He later filed an amended PCRA petition and then an amended supplemental PCRA petition. On June 24, 2012, the PCRA court issued notice that it intended to dismiss Appellant's petition without holding an evidentiary hearing. The court formally dismissed the petition on May 25, 2012. Appellant timely filed a notice of appeal.

In his brief to this Court, Appellant asks us to consider one question, namely:

I. WAS TRIAL COUNSEL INEFFECTIVE FOR NOT URGING THAT PETITIONER BE FOUND NOT GUILTY OR HIS CONVICTION VACATED BECAUSE IT WAS NOT FOUNDED ON ANY SWORN TESTIMONY AND THEREFORE VIOLATED DUE PROCESS OF LAW?

Appellant's Brief at 7.

We review such matters in the following manner:

This Court's standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record.

[T]he right to an evidentiary hearing on a post-conviction petition is not absolute. It is within the PCRA court's discretion to decline to hold a hearing if the petitioner's claim is patently frivolous and has no support either in the record or other evidence. It is the responsibility of the reviewing court on appeal to examine each issue raised in the PCRA petition in light of the record certified before it in order to determine if the PCRA court erred in its determination that there were no genuine issues of material fact in controversy and in denying relief without conducting an evidentiary hearing.

***Commonwealth v. Walls***, 993 A.2d 289, 294-95 (Pa. Super. 2010) (citations omitted).

Appellant claims that his trial counsel rendered ineffective assistance. The law regarding such claims can be summarized in the manner that follows.

It is well-established that counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error. The PCRA court may deny an ineffectiveness claim if the petitioner's evidence fails to meet a single one of these prongs. . . . [An appellant appealing an order denying PCRA relief] is challenging the PCRA court's finding that he did not satisfy his burden of proof. Because courts must presume that counsel was effective, it is the petitioner's burden to prove otherwise. [Appellate courts] cannot grant relief on an ineffectiveness claim unless the appellant proves the PCRA court wrongly determined that he failed to satisfy all of the *Pierce* elements. . . .

. . . [A]ppellants continue to bear the burden of pleading and proving each of the [three prongs of ineffective assistance of counsel standard] on appeal . . . .

***Commonwealth v. Natividad***, 938 A.2d 310, 321-22 (Pa. 2007) (citations and quotation marks omitted).

According to Appellant, the only witness to testify at his preliminary hearing was Mason Staten. Appellant maintains that Staten exculpated Appellant at the preliminary hearing but was impeached with an inconsistent statement that he earlier had provided to police. Appellant states that Mr.

Staten was murdered prior to Appellant's trial. Appellant then asserts that, at his trial, the only evidence the Commonwealth presented to connect him to the murder of Mr. Clark was Mr. Staten's preliminary hearing testimony. Appellant now claims that "[t]rial counsel was [ ] ineffective for failing to urge that Appellant's conviction be vacated due to the absence of any sworn evidence connecting him to the crime." Appellant's Brief at 14.

The argument that Appellant offers in support of his claim is less than clear. Appellant indicates that, at the time of his trial, established law held that Mr. Staten's preliminary hearing testimony was admissible as substantive evidence against him. He, however, highlights that our Supreme Court granted allowance of appeal in *Commonwealth v. Brown*, 989 A.2d 881 (Pa. 2009). Appellant notes that, at the time he drafted his brief, the Supreme Court had not decided *Brown*. According to Appellant, "[o]f course the decision of the Pennsylvania Supreme Court in Brown will be dispositive as to the state law questions posed by this claim." Appellant's Brief at 11. As best we can discern, Appellant believes trial counsel should have moved for an acquittal after the Commonwealth rested because the Commonwealth failed to produce any sworn testimony connecting Appellant to Mr. Clark's murder.<sup>1</sup>

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<sup>1</sup> Appellant fails to state with specificity what action he believes trial counsel should have taken at trial. He frames his issue by claiming that counsel was ineffective for "not urging" that Appellant be found not guilty or his conviction vacated. Appellant's Brief at 10. He later states that trial counsel should have lodged some sort of objection to the process employed at trial. *See, e.g., id.* at 13 ("In any event, proper procedure or not, trial counsel was ineffective for failing to object as delineated below on due process (Footnote Continued Next Page)

The unclear nature of Appellant's claim makes it difficult to address. In any event, Appellant failed to meet his burden on appeal of pleading and offering proof as to each of the three prongs of the ineffective assistance of counsel standard. His argument to this Court makes no mention of the second prong of this standard, *i.e.*, whether counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest. Appellant does mention "prejudice" in his argument, *id.* at 14; however, this mention amounts to nothing more than a bald assertion. **See *Commonwealth v. Chmiel***, 30 A.3d 1111, 1128 (Pa. 2011) ("We stress that boilerplate allegations and bald assertions of no reasonable basis and/or ensuing prejudice cannot satisfy a petitioner's burden to prove that counsel was ineffective.") (citation and quotation marks omitted). Moreover, to the extent that the due process issue presented in ***Brown*** is dispositive of Appellant's claim (as he asserts), we observe that the Supreme Court decided that claim against Brown. ***Commonwealth v. Brown***, 52 A.3d 1139, 1154-71 (Pa. 2012).

Order affirmed.

(Footnote Continued) \_\_\_\_\_

grounds . . ."). Appellant also suggests that counsel should have moved for an acquittal at the close of the Commonwealth's case. ***Id.***