

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ALFRED A. MAYO,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1753 MDA 2012

Appeal from the PCRA Order of September 25, 2012,
in the Court of Common Pleas of Schuylkill County,
Criminal Division at Nos. CP-54-CR-0001538-2008
CP-54-CR-0001540-2008

BEFORE: SHOGAN, MUNDY and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

FILED MAY 22, 2013

Appellant presents numerous issues in this appeal from the order denying his petition under the Post Conviction Relief Act ("PCRA"). We affirm the order.

The record reveals the following facts. Police used informants, one named Reaves and one named Hook, to buy crack cocaine from Appellant. The drug purchases occurred on two separate dates. As a result of those drug transactions, the Commonwealth charged Appellant in two criminal cases with counts of delivery of a controlled substance, possession with intent to deliver a controlled substance, possession of a controlled

* Retired Senior Judge assigned to the Superior Court.

substance, and unlawful use of a communication facility. Prior to trial, he filed a petition for *habeas corpus* relief. The court denied the petition. Appellant later proceeded to a jury trial in which his two cases were consolidated. The jury convicted him of all counts. On direct appeal, this Court affirmed his judgment of sentence. ***Commonwealth v. Mayo***, 30 A.3d 547 (Pa. Super. 2011) (unpublished memorandum). He did not petition the Pennsylvania Supreme Court for allowance of appeal. Appellant later filed a timely PCRA petition. The court denied relief after a hearing. Appellant filed this appeal.

The following legal principles will be relevant to our resolution of this case.

To establish ineffectiveness of counsel, a PCRA petitioner must show the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. ***Commonwealth v. Cox***, 983 A.2d 666, 678 (Pa. 2009). Counsel's actions will not be found to have lacked a reasonable basis unless the petitioner proves that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. ***Id.*** Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different. ***Id.*** The law presumes counsel was effective. ***Id.***

Generally, issues and/or theories not preserved in the PCRA court cannot be raised on appeal. Pa.R.A.P. 302(a). Additionally, it is the appellant's duty to demonstrate which part of the certified record reveals the fact of preservation. **Commonwealth v. Rush**, 959 A.2d 945, 949-50 (Pa. Super. 2008); Pa.R.A.P. 2117(c), 2119(e). Also, an issue is waived for PCRA purposes if it could have been raised at trial or on appeal but was not. 42 Pa.C.S.A. § 9544(b).

Our standard for reviewing PCRA orders is to determine whether the court's rulings are supported by the record and free of legal error. **Cox**, 983 A.2d at 679. A PCRA court's credibility determinations are binding on this Court if supported by the record. **Commonwealth v. Widgins**, 29 A.3d 816, 820 (Pa. Super. 2011).

It is an appellant's burden to persuade us the PCRA court erred and relief is due. **Commonwealth v. Wrecks**, 931 A.2d 717, 722 (Pa. Super. 2007). To satisfy this burden, the appellant must present arguments sufficiently developed for our review. **Commonwealth v. Hardy**, 918 A.2d 766, 771 (Pa. Super. 2007). Those arguments must contain pertinent discussion, references to the record and citations to legal authorities. **Id.**; Pa.R.A.P. 2119(a), (b), (c). Citations to authorities must articulate the principles for which they are cited. **Hardy**, 918 A.2d at 771; Pa.R.A.P. 2119(b). This Court will not act as counsel and will not develop arguments on behalf of an appellant. **Hardy**, 918 A.2d at 771.

Appellant first claims his trial counsel was ineffective in improperly advising Appellant that one or more of Appellant's prior convictions could be used to impeach him if he testified at trial. According to Appellant, the conviction(s) could not be used in that fashion because it or they were not *crimen falsi*. Appellant's point is that he chose not to testify based on the allegedly improper advice about his criminal record and its potential evidentiary uses.

After considering parts of the trial transcript in which Appellant, his counsel and the court discussed Appellant's right to testify, the PCRA court simply did not believe Appellant's PCRA testimony as to the reason he chose not to testify (*i.e.*, counsel's advice about the potential evidentiary uses of Appellant's record). In this regard, the court essentially reasoned that, although trial counsel may have initially given inaccurate advice about the possible uses of Appellant's record, any such advice was not material to Appellant's choice. More particularly, the court found that trial counsel advised Appellant not to testify at trial because counsel's strategy was to rely both on upcoming defense witnesses and on what counsel believed were weaknesses in the Commonwealth's proof (*e.g.*, weak testimony of one or both informants). The court also found this strategy to have been reasonable. Additionally, the court further determined that Appellant, when deciding not to testify, accepted and agreed with counsel's aforesaid strategy and did not make his decision because of any advice, even if improper, concerning his criminal history. Based on the foregoing reasons,

the PCRA court concluded Appellant had not proven trial counsel was ineffective.

Appellant has not shown us that the court's credibility and factual determinations regarding his reason for not testifying were unsupported by the record. We will not disturb those determinations. Accordingly, Appellant cannot obtain relief on this claim.

Appellant similarly complains the trial court itself wrongly advised Appellant about the extent to which his prior record could be used to impeach him. This complaint of trial court error could have been raised on direct appeal. It was not. It is waived for PCRA purposes.

In his next issue, Appellant claims direct appeal counsel was ineffective in not filing a petition for allowance of appeal to the Pennsylvania Supreme Court after we affirmed Appellant's judgment of sentence in 2011.

The PCRA court reasoned that direct appeal counsel did not petition for allowance of appeal because, during the time for doing so, counsel received a letter from Appellant indicating Appellant had discharged counsel and had secured other counsel to file the Supreme Court petition. Appellant does not confront this determination in his brief in order to demonstrate how the court was wrong. Along these same lines, we note that, while Appellant makes passing reference to the law concerning counsel's failure to file a

petition for allowance of appeal, Appellant does not apply the law to the particulars of his case.¹ He is, therefore, not entitled to relief.

Appellant asserts the Commonwealth committed prosecutorial misconduct during his trial and/or during the pretrial *habeas corpus* proceeding. If Appellant wanted to complain of prosecutorial misconduct, he could have raised the issue when the alleged misconduct occurred (*i.e.*, during trial and/or the *habeas* proceeding) and, if unsuccessful in his claim, could have pursued it on direct appeal. Appellant has not made clear to us whether he did or did not raise this issue at trial and/or during the *habeas* proceeding, but we see that he did not pursue this claim on direct appeal. Having not pursued this matter on direct appeal, it is waived for PCRA purposes.

Appellant argues trial counsel was ineffective during the plea-negotiation stage because counsel did not determine Appellant's true prior record score ("PRS") and his sentencing guidelines. Appellant suggests counsel's errors deprived Appellant of the opportunity to make a well-

¹ Appellant claims the Commonwealth concedes his direct appeal counsel was ineffective. This claim is belied by the Commonwealth's cursory brief in which the Commonwealth adopts the PCRA court's opinion. In any event, of importance to us is not what the Commonwealth might concede but, rather, whether Appellant has applied the law to show his counsel was ineffective such that the PCRA court should have granted relief. Appellant has not done so.

counseled decision when he chose to forgo a guilty plea and proceeded to trial.

On this issue, Appellant has provided a single citation to one page of the PCRA transcript. That page does not reveal to us what counsel said and did pretrial with respect to Appellant's PRS and sentencing guidelines. Thus, Appellant has not substantiated his claim about counsel's actions. We will not scour the record to determine if Appellant's factual claims are accurate or not. Appellant has not convinced us trial counsel was ineffective.

Appellant also presents multiple complaints about trial counsel's examination of witnesses both at trial and at the *habeas* proceeding. First, Appellant maintains trial counsel was ineffective in failing to examine the informants and police officers about their differing testimony as to the denominations of bills used in the drug transactions with Appellant. Appellant also contends counsel was ineffective in not examining the officers concerning their location and opportunity to observe Appellant during the drug buys. The PCRA court determined Appellant's claims were meritless.

In his brief, Appellant makes the foregoing general assertions as to counsel's alleged failures. However, Appellant does not provide citations to testimony revealing that there were, in fact, any inconsistencies/discrepancies in the testimony and/or that the officers' location(s) and/or opportunities to observe the drug sales were in any way

assailable. Accordingly, we are not persuaded that the PCRA court erred and that Appellant is entitled to some remedy.

Appellant also contends trial counsel was ineffective in not examining one informant, Reaves, as to his bias against Appellant. Appellant makes various factual assertions about that alleged bias and its origin. However, Appellant offers no references to the record to demonstrate the existence of the facts on which he relies. Therefore, Appellant has not convinced us he is entitled to relief.

Appellant also argues counsel should have objected at the *habeas* proceeding to testimony from Hook regarding Appellant's criminal activity in unrelated cases. Furthermore, Appellant claims that, at trial, counsel should have moved to redact Hook's testimony regarding Appellant's other criminal acts before that testimony was read into the record. The *habeas* testimony was admitted at trial because the court declared Hook unavailable.

The PCRA court found some merit to Appellant's arguments regarding counsel's performance with respect to Hook's testimony. However, the court reasoned that Appellant had not suffered prejudice. On this point, the court observed that it issued a limiting instruction to the jury concerning the use of Hook's prior testimony.

Appellant does not critique the PCRA court's reasoning. He does not develop an argument analyzing the overall trial evidence, Hook's *habeas*

testimony and the court's limiting instruction in order to demonstrate that the outcome of the proceedings would have likely been different absent counsel's complained-of conduct. Having not shown prejudice, Appellant has not given us cause to disturb the PCRA court's decision.

Appellant next contends trial counsel was ineffective in not complaining that the jury pool violated Appellant's rights under ***Batson v. Kentucky***, 476 U.S. 79 (1986). Other than providing the general citation to ***Batson***, Appellant does not expound on the legal principles therein and does not try to apply them to his case. Moreover, while he makes some factual claims about the make-up of the venire and the eventual jury, he provides no record references to substantiate his factual claims. On this point, Appellant seems to be asserting that the jury-selection process was not recorded by a court reporter. This may be so, but Appellant does not demonstrate that he adduced any PCRA testimony to support his current assertions. Appellant also does not make an effort to apply the three-pronged ineffectiveness test to his unsubstantiated factual assertions. He has not convinced us of any error by the PCRA court.

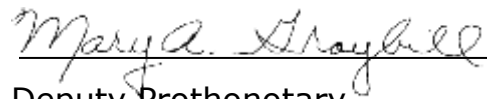
Lastly, Appellant argues trial counsel was ineffective in not opposing the joinder of his two cases for a single trial and/or in not thereafter moving to sever those cases. Appellant does not discuss the law relating to the joinder and/or severance of cases. He has, therefore, not shown us counsel was ineffective in failing to utilize that law. Appellant's claim fails.

In light of our foregoing discussion, we affirm the PCRA court's order.

Order affirmed.

Judge Mundy concurs in the result.

Judgment Entered.


Deputy Prothonotary

Date: 5/22/2013