

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KENNETH N. NEAL,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1758 EDA 2012

Appeal from the PCRA Order entered June 5, 2012  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-1207671-2004

BEFORE: LAZARUS, OLSON AND FITZGERALD,\* JJ.

MEMORANDUM BY OLSON, J.:

**FILED MAY 23, 2013**

Appellant, Kenneth N. Neal, appeals from an order entered on June 5, 2012 in the Criminal Division of the Court of Common Pleas of Philadelphia County that denied his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On direct appeal, this Court summarized the factual background of this case as follows:

Complainant, A.B.,<sup>1</sup> lived with her step-father (Appellant), mother, brother, and sister in various apartments throughout Philadelphia from the time she was an infant until she was twelve years of age. During this period, both Appellant and [C.B.], complainant's mother, had severe drug and alcohol addictions. When complainant was approximately six or seven

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<sup>1</sup> As complainant was under the age of eighteen during the entirety of the crimes in question, [she shall be referred to] by her initials.

\*Former Justice assigned to the Superior Court.

years old, Appellant summoned her to his room and proceeded to rub his hand over her vagina and place his finger and tongue inside her vagina. No further sexual contact occurred until complainant was approximately nine or ten years old, at which time Appellant performed oral sex on A.B. and attempted to have vaginal intercourse with her.

The Department of Human Services removed complainant from her mother's home in 2004, and she began living with her biological father when she was approximately fourteen years old. A.B. informed her father and stepmother of the abuse in 2004, and they promptly informed the police.

Appellant's jury trial began on June 24, 2007, and two days later the jury convicted Appellant of the aforementioned crimes. On January 11, 2008, following a hearing on the matter, [the trial court] determined that Appellant was a sexually violent predator pursuant to Megan's Law, 42 Pa.C.S.A. § 9791 *et seq.* The trial court sentenced Appellant to concurrent terms of 8 to 20 years imprisonment for rape, 8 to 20 years imprisonment for involuntary deviate sexual intercourse, 3 to 7 years imprisonment for endangering the welfare of a child, and 2 to 5 years imprisonment for corrupting the morals of a minor.<sup>2</sup>

***Commonwealth v. Neal***, 986 A.2d 1261 (Pa. Super. 2009) (unpublished memorandum) (footnotes in original) at 2-3.

The PCRA court summarized the ensuing procedural history as follows:

A timely post[-]sentence motion was denied without a hearing on February 1, 2008, [the Superior Court] affirmed [Appellant's] judgment [of sentence] in the direct appeal on September 18, 2009, [] and [the] Supreme Court denied [Appellant's petition for further review] on December 29, 2009. The subject PCRA petition was filed *pro se* on July 16, 2010, and present counsel was appointed who filed an amended petition on August 2, 2011. The Commonwealth filed a motion to dismiss the petition on January 11, 2012, and, after a number of continuances at the

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<sup>2</sup> The sentencing court indicated on the record that the statutory limit was 10-20 years in prison on the rape charge.

request of [Appellant], on April 19, 2012, the [PCRA] court served a Notice of Intent to Dismiss Pursuant to Pa.R.Crim.P. 907 stating that the petition would be dismissed on June 5<sup>th</sup> for lack of merit, which it did without a hearing on that date.

PCRA Court Opinion, 8/30/12, at 1-2 (italics in original removed).

In his brief, Appellant raises the following questions for our consideration:

Whether the PCRA Court erred in failing to grant an evidentiary hearing regarding the ineffective assistance of counsel claims presented by Appellant, to wit, a) that counsel failed to object to the Prosecutor's admission of prior bad acts evidence during trial; b) that counsel failed to object when the Commonwealth made numerous inquiries into arguments that occurred between the Appellant and Betty Marshal; and c) that trial counsel failed to seek a timely cautionary instruction for this highly prejudicial and objectionable testimony elicited by the Prosecutor?

Did the court below commit error by failing to order and hold an evidentiary hearing to determine if appellate counsel's representation amounted to a violation of his right to counsel under the U.S. and Pennsylvania Constitutions where counsel failed to challenge on appeal whether Appellant's due process rights guaranteed under both the Pennsylvania and U.S. Constitutions (Amend. V, VI & XIV, and Art. I, sec. § 9, respectively) were violated when prior bad acts were admitted at trial?

Whether the trial court erred in failing to order an evidentiary hearing where Appellant claimed that the trial court imposed an illegal sentence when it utilized the 6<sup>th</sup> Edition rather than the 5<sup>th</sup> Edition of the Pennsylvania guidelines during sentencing?

Whether the PCRA Court committed error by failing to conduct an evidentiary hearing on the issues of trial [and appellate counsel were ineffective where] trial counsel failed to object at or after sentencing, and where appellate counsel failed to raise the claim during the appeal that incorrect guidelines were utilized during sentencing?

Whether the PCRA Court erred in failing to hold an evidentiary hearing on Appellant's claim that his rights under the confrontation clause of the Pennsylvania constitution and the 6<sup>th</sup> Amendment of the U.S. Constitution were violated where a police officer was permitted to testify regarding information contained within the Department of Human Services records without benefit of any witness from D.H.S. and without testimony from any witness from whom the alleged evidence was obtained?

Did the court below commit error by failing to order and hold an evidentiary hearing to determine if appellate counsel's representation amounted to a violation of his right to counsel under the U.S. and Pennsylvania Constitutions for failing to raise violations of the confrontation clause?

Appellant's Brief at 4.

Each of the issues Appellant raises on appeal allege that the PCRA court erred in failing to convene a hearing to assess the underlying merits of his contentions. Therefore, before we address the validity of Appellant's individual claims, we set forth our general standard of review, including the standard we apply in determining whether a PCRA court properly refused to conduct a hearing on a PCRA petitioner's claims for relief.

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, 294-295 (Pa. Super. 2010) (citations omitted). We review Appellant's substantive allegations of ineffective assistance of counsel under a familiar standard:

To prevail on a claim alleging counsel's ineffectiveness, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness. In order to meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A 'reasonable probability' is defined as 'a probability sufficient to undermine confidence in the outcome.'

However, [w]hen an arguable claim of ineffective assistance of counsel has been made, and there has been no evidentiary hearing in the [trial court] to permit the defendant to develop evidence on the record to support the claim, and to provide the Commonwealth an opportunity to rebut the claim, this Court will remand for such a hearing.

***Walls***, 993 A.2d at 296-297 (quotation marks and citations omitted).

We first consider the PCRA court's reasons for denying Appellant's request for a hearing on his petition for collateral relief. In denying Appellant's request, the PCRA court explained:

[Appellant] has completely failed to [establish that an evidentiary hearing was needed to address the claims advanced in his PCRA petition.] He simply alleges errors and then tacks on [boilerplate] allegation[s] that all his prior attorneys were negligent in failing to address them. He provides no legal analysis demonstrating each layer of their alleged ineffectiveness, how the claimed errors so undermined the truth determining process that that no reliable adjudication could have

taken place, or that counsels' actions or failures to act could not have been the result of any rational strategic or tactical decision. Nor does he demonstrate how he was prejudiced; he makes no effort to demonstrate that the result of his trial would have been different. He simply claims there was error and that he's entitled to relief. What jumps out immediately is the fact that, although all of the claims are that the [PCRA] court erred in failing to conduct a hearing to determine whether the errors he alleges occurred or were errors, he solely relies on the contents of the existing trial evidence in factual support of his claims. The [PCRA] court was, therefore, perfectly justified in not conducting a hearing since [Appellant] has not [offered] to prove anything outside the record and the court can read the transcripts without the need for a hearing. If [Appellant] has not alleged the existence of any relevant evidence outside the record, there is no evidence for the court to hear and evaluate and [Appellant] is not entitled to a hearing. Of course, the court [must still] address each underlying claimed error in order to make that determination as well as whether they were, in fact, errors and, if so, whether they were so egregious as to require relief.

PCRA Court Opinion, 8/30/12, at 8-9. Based upon our review of Appellant's petition, as amended by counsel, together with the record certified before us, we concur in the PCRA court's assessment that Appellant failed to raise a genuine issue of fact that would necessitate a hearing in order to determine whether he was entitled to collateral relief. Accordingly, the PCRA court did not abuse its discretion in declining to conduct a hearing in this matter. We turn now to consider the merit of Appellant's claims for relief.

In his first two claims, Appellant asserts that trial counsel was ineffective in failing to object to prior bad acts testimony and in failing to request cautionary instructions limiting the jury's consideration of such evidence. Appellant also claims that appellate counsel was ineffective in failing to challenge the admission of such evidence on appeal. Since these

contentions rest upon the identical legal principles, we address them together.

Pa.R.E. 404(b) governs the admission of other crimes, wrongs, or acts.

It provides:

**(b) Other crimes, wrongs, or acts.**

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of any such evidence it intends to introduce at trial.

Pa.R.E. 404(b). The commentary to Rule 404(b) clarifies that subsection 2 sets forth “a **non-exhaustive** list of purposes, other than proving character in order to show action in conformity therewith, for which evidence of other crimes, wrongs, or acts committed by a person may be admitted.” ***Id.*** at cmt (emphasis added). The comments also make clear that a limiting instruction must be given where it is requested. ***Id.***

Based upon our review of the certified record, the PCRA court correctly concluded that Appellant was not entitled to relief on his prior bad act

claims. Trial counsel for Appellant objected repeatedly to questions intended to elicit testimony regarding Appellant's prior bad acts. The trial court overruled these objections because the Commonwealth offered this testimony to explain why the victim delayed in reporting Appellant's attacks, to rebut testimony regarding Appellant's good character, or to establish the factual history of the case. A cautionary instruction was given at the request of defense counsel. Because evidence pertaining to Appellant's prior bad acts was properly admitted at trial, Appellant's challenge to the stewardship of trial and appellate counsel lacked arguable merit. Accordingly, no relief is due on Appellant's first two claims.

In his third and fourth claims, Appellant asserts that the PCRA court erred in sentencing Appellant under the 6<sup>th</sup> Edition of the Pennsylvania sentencing guidelines, rather than the 5<sup>th</sup> Edition, and that trial and appellate counsel were ineffective in failing to challenge this alleged error.<sup>3</sup> The record contradicts the factual underpinning of these claims and establishes clearly that Appellant's sentencing claim was previously litigated

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<sup>3</sup> Under 204 Pa. Code § 303.1(c), the edition of the sentencing guidelines which is in effect at the time an offense is committed applies in a particular case. Appellant's offenses here occurred in 1994-1995 and 1997-1998; hence, the 5<sup>th</sup> Edition of the guidelines, which became effective on June 13, 1997, was applicable. The 5<sup>th</sup> Edition recommends a standard range sentence of 48 to 66 months, plus or minus 12 for the crimes of rape and involuntary deviate sexual intercourse. **See** 204 Pa. Code §§ 303.15 and 303.16. Under 42 Pa.C.S.A. § 9718, however, Appellant was subject to a mandatory minimum term of incarceration of five years for his convictions since his victim was less than 16 years old.



and rejected on direct appeal. In rejecting Appellant's claim, we said on direct appeal:

Herein, the sentencing court noted a mandatory minimum prison term applied to Appellant's rape and involuntary deviate sexual intercourse convictions and ran the sentences for those crimes and the others with which Appellant had been convicted [concurrently]. Furthermore, Appellant filed a post sentence motion wherein he alerted the trial court that the wrong Sentencing Guidelines had been referenced prior to sentencing and that the [5<sup>th</sup> Edition] recommended a standard range of sentence to be [48] to [66] months, plus or minus [12] for the crimes of rape and involuntary deviate sexual intercourse. The sentencing court denied the motion, and in its Opinion pursuant to Pa.R.A.P. 1925(a) acknowledged that it "should have used the sentencing guidelines in effect from June 13, 1997[,] until June 3, 2005. On the charges of rape and involuntary deviate sexual intercourse, the correct guideline range was 48-66 months, plus or minus 12 months. The trial court, in using the incorrect sentencing guidelines, used the incorrect guideline range of 72 months to the statutory maximum." Trial Court Opinion, filed 12/12/08, at 13-14. In deciding not to modify its sentence, the court reasoned that "[a]s Appellant in this case was sentenced within the statutory maximum sentence provided in 18 Pa.C.S. § 106(b)(2), the fact that the [c]ourt considered the [6<sup>th</sup> Edition] is constitutionally irrelevant." *Id.* at 15. As such, Appellant cannot show he had been prejudiced by the sentencing court's failure to consider the [5<sup>th</sup> Edition] of the sentencing [g]uidelines, as a mandatory minimum sentence superseded them, and the application of the [6<sup>th</sup> Edition] did not increase his sentence for even when made aware of the error, the sentencing court indicated it would have rendered the same sentence. Any error that may have occurred at sentencing was, therefore, harmless.

**Commonwealth v. Neal**, 986 A.2d 1261 (Pa. Super. 2009) (unpublished memorandum) at 14-15. Because Appellant's sentencing claim has previously been litigated, he is not eligible for relief for this alleged error. **See** 42 Pa.C.S.A. § 9543(a)(3) (allegation of error may not be previously

litigated); **see also** 42 Pa.C.S.A. § 9544(a)(2) (claim is previously litigated if highest appellate court in which petitioner could have had review as a matter of right has ruled on the merits of the issue).

Appellant's fifth and sixth claims assert that the Commonwealth violated his Confrontation Clause rights and that appellate counsel was ineffective in failing to raise this claim on appeal. Appellant's claims here challenge the admission of a police officer's testimony regarding information allegedly contained within certain Department of Human Services (DHS) records without the benefit of any witness from DHS and without testimony from any witness from whom the alleged evidence was obtained. The record belies these claims. The PCRA court found that:

[W]hile [Appellant] goes to great length to claim that the contents of the [DHS] file were put into evidence, a review of the testimony that [Appellant] cites clearly shows that the officer never testified as to the substance of the file, either on direct or cross. She only described what items it contained, not what was in those items. As for the failure to have one of the persons who prepared some of the contents of the file, [Appellant] again merely claims that the reports contain errors, but does not describe what those errors are, how they are relevant, what they would prove or disprove, or how [Appellant] was in any way prejudiced by their not being admitted. He has thus completely failed to even mention, let alone establish, any of the required bases for PCRA relief. Even if the officer did specifically testify as to the substance of the records, it is well established that those types of records can be admitted to explain the course of a police investigation because they are offered not for the truth of the matters asserted therein but rather to show the information upon which the police acted.

PCRA Court Opinion, 8/30/12, at 9-10. Our review of the certified record confirms support for the PCRA court's findings and our research

demonstrates that its conclusion is free of legal error. ***See Commonwealth v. Chmiel***, 889 A.2d 501, 532-533 (Pa. 2005) (“[I]t is well established that certain out-of-court statements offered to explain the course of police conduct are admissible because they are offered not for the truth of the matters asserted but rather to show the information upon which police acted.”). Consequently, Appellant’s final two claims merit no relief.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambetta", written over a horizontal line.

Prothonotary

Date: 5/23/2013