

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

KEVIN CLAYTON MITCHELL, JR.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1794 MDA 2012

Appeal from the Order of September 11, 2012,
in the Court of Common Pleas of Lebanon County,
Criminal Division at No. CP-38-CR-0001037-2008

BEFORE: SHOGAN, MUNDY and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

FILED JUNE 03, 2013

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

The relevant background underlying this matter can be summarized in the following manner. Appellant was arrested and charged with committing multiple crimes in connection to his infant daughter's death. Appellant eventually entered a *nolo contendere* plea to, *inter alia*, first-degree murder. For that conviction, the trial court sentenced Appellant to life in prison without the possibility of parole. This Court affirmed the judgment of sentence. ***Commonwealth v. Mitchell***, 11 A.3d 1041 (Pa. Super. 2010) (unpublished memorandum).

*Retired Senior Judge assigned to the Superior Court.

Appellant, acting *pro se*, timely filed a PCRA petition. The PCRA court appointed counsel to represent Appellant, and counsel later filed an amended PCRA petition. The PCRA court held an evidentiary hearing and later denied the petition. This appeal followed.

In his brief to this Court, Appellant asks us to consider the following questions.

A. DID THE [PCRA] COURT ERR BY NOT FINDING THAT [PLEA COUNSEL] WAS INEFFECTIVE FOR FAILING TO CALL WITNESSES ON BEHALF OF [APPELLANT]?

B. DID THE [PCRA] COURT ERR BY NOT FINDING THAT [PLEA COUNSEL] WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO WITHDRAW THE NOLO CONTENDERE PLEA PRIOR TO SENTENCING?

C. DID THE [PCRA] COURT ERR BY FINDING THAT THE NOLO CONTENDERE COLLOQUY EMPLOYED BY [APPELLANT] WAS NOT DEFECTIVE AND THEREFORE VALID?

D. DID THE [PCRA] COURT ERR BY NOT FINDING THAT [APPELLANT] WAS COERCED BY [PLEA COUNSEL] INTO PLEADING NOLO CONTENDERE?

Appellant's Brief at 4 (suggested answers omitted).

Generally speaking, "[o]n appeal from the denial of PCRA relief, an appellate court's standard of review is whether the ruling of the PCRA court is free of legal error and supported by the record." ***Commonwealth v. Jones***, 932 A.2d 179, 181 (Pa. Super. 2007). Appellant's first two issues concern claims of ineffective assistance of counsel.

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).

Under his first issue, Appellant raises the peculiar claim that plea counsel rendered ineffective assistance by failing to call character witnesses at trial. Appellant makes any number of odd statements, such as, "Prior to making a determination of guilt, the jury needed to hear from [Appellant's] witnesses." Appellant's Brief at 26.

The PCRA court found this claim to be "utterly baseless" because no trial occurred in this case; rather, Appellant entered a plea of *nolo contendere*. PCRA Court Opinion, 09/11/12, at 5-6. We agree with the PCRA court. Plea counsel cannot be deemed ineffective for failing to call character witnesses at a non-existent trial. Appellant's first issue warrants no relief.

Under his second issue, Appellant maintains that he asked plea counsel to withdraw his plea prior to sentencing and that counsel refused to honor his request. According to Appellant, counsel's refusal to withdraw the plea constitutes ineffective assistance.

At the evidentiary hearing, plea counsel testified that Appellant never asked counsel to withdraw his plea. N.T., 03/12/12, at 38-40. Appellant testified that he did make such a request. *Id.* at 67-68. In rejecting Appellant's claim, the PCRA court found counsel's testimony to be credible. PCRA Court Opinion, 09/11/12, at 6-7.

"A PCRA court's credibility findings are to be accorded great deference. Indeed, where the record supports the PCRA court's credibility determinations, such determinations are binding on a reviewing court." *Commonwealth v. Dennis*, 17 A.3d 297, 305 (Pa. 2011) (citations omitted). Appellant fails to cite anything in the record that would suggest that the PCRA court's credibility findings lack the proper support. Moreover, our review of the record indicates that it supports the PCRA court's credibility determination. We, therefore, are bound by that court's credibility determination. Appellant's second issue warrants no relief.

The exact nature of Appellant's third issue is unclear. The thrust of Appellant's argument appears to be that his plea was involuntary because his colloquy was defective. *See, e.g.*, Appellant's Brief at 33 ("Therefore, [Appellant's] plea was defective and he should be permitted to withdraw his involuntary plea and be awarded a new trial."). Appellant could have, but did not, raise this challenge in a pre- or post-sentence motion to withdraw

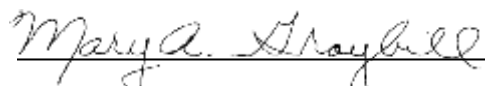
his plea. Instead, he chose to raise the challenge for the first time in his PCRA petition. Thus, for purposes of the PCRA, Appellant has waived this issue. **See** 42 Pa.C.S.A. § 9544(b) (“For purposes of [the PCRA], an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.”). This issue, therefore, is not cognizable under the PCRA. **See** 42 Pa.C.S.A. § 9543(a)(3) (“To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence . . . [t]hat the allegation of error has not been . . . waived.”).

Under his last issue, Appellant asserts that plea counsel coerced him into pleading *nolo contendere*. Once again, the exact nature of Appellant’s issue is unclear. Moreover, Appellant fails to cite any legal authority to support his undeveloped, unclear argument. Appellant’s Brief at 34-35. As such, it is waived. **See *Commonwealth v. Clayton***, 816 A.2d 217, 221 (Pa. 2002) (“Furthermore, it is a well settled principle of appellate jurisprudence that undeveloped claims are waived and unreviewable on appeal.”).

For these reasons, we affirm the order denying Appellant’s PCRA petition.

Order affirmed.

Judgment Entered.


Deputy Prothonotary

Date: 6/3/2013