

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

CESAR L. FEBUS, III

Appellant

No. 1806 EDA 2012

Appeal from the PCRA Order May 3, 2012
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0004013-2006

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.

Filed: March 1, 2013

Cesar L. Febus, III, appeals from the order denying his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541, *et seq.* Febus' counsel has filed a petition to withdraw and a no-merit letter. After careful review, we grant counsel's petition to withdraw and affirm the PCRA court's order.

On June 8, 2007 Febus pled guilty to one count of criminal homicide generally and other related charges stemming from an incident in which he shot and killed Sandra Yohe as he and his co-conspirators fled the scene of another crime. After waiving his right to a jury for the degree-of-guilt hearing, on July 12, 2007, the court found Febus guilty of murder in the first degree and sentenced him to life imprisonment, plus a consecutive term of ten to twenty years' incarceration. Febus' post-sentence motions were

denied; he subsequently appealed to this Court, which affirmed his judgment of sentence on July 30, 2010. The Pennsylvania Supreme Court denied Febus' petition for allowance of appeal on February 23, 2011.

On October 21, 2011, Febus filed a timely first *pro se* PCRA petition. Court-appointed counsel filed an amended petition and the PCRA court held an evidentiary hearing on April 16, 2012. By order dated May 3, 2012, the PCRA court dismissed Febus' petition.

This timely appeal follows, in which counsel has filed a petition to withdraw. When counsel seeks to withdraw, we first review counsel's submissions, as follows:

Counsel petitioning to withdraw from PCRA representation must proceed . . . under ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1998), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). . . . ***Turner/Finley*** counsel must review the case zealously. ***See Commonwealth v. Mosteller***, 633 A.2d 615, 617 (Pa. Super. 1993). ***Turner/Finley*** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw. ***Commonwealth v. Karanicolas***, 836 A.2d 940, 947 (Pa. Super. 2003).

Counsel must also send to the petitioner: (1) a copy of the "no merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel. ***Commonwealth v. Friend***, 896 A.2d 607, 615 (Pa. Super. 2006).

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa. Super. 2007).

Here, counsel has complied with the *Turner/Finley* requirements. Accordingly, we proceed to our own independent review of Febus' issues to determine whether they are truly meritless.

In her *Turner/Finley* letter, counsel states that Febus wished to raise the following issues of trial counsel's ineffectiveness:¹ (1) causing Febus to enter a guilty plea unknowingly, involuntarily and unintelligently; (2) failing to advise Febus of the full extent of the plea agreement or the consequences of pleading guilty; (3) failing to object at the degree of guilt hearing to evidence of other crimes; and (4) failing to call various witnesses at Febus' degree-of-guilt hearing.

This Court's standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. In evaluating a PCRA court's decision, our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the trial level.

Commonwealth v. Weatherill, 24 A.3d 435, 438 (Pa. Super. 2011).

In order to prevail on a claim of ineffectiveness of counsel, an appellant must demonstrate that: (1) his claims are of arguable merit; (2) counsel had no reasonable basis for his actions; and (3) counsel's actions prejudiced appellant. ***Commonwealth v. Pierce***, 527 A.2d 973, 975

¹ Febus did not file a response to counsel's petition to withdraw or her *Turner/Finley* letter.

(1987). When a petitioner under the PCRA alleges ineffectiveness of counsel in connection with a guilty plea, he will only be entitled to relief where he can plead and prove that counsel's ineffectiveness caused him to enter an involuntary or unknowing plea. ***Commonwealth v. Allen***, 732 A.2d 582, 587 (Pa. 1999). A defendant alleging ineffectiveness must show that counsel's allegedly deficient stewardship resulted in a manifest injustice. ***Commonwealth v. Morrison***, 878 A.2d 102, 105 (Pa. Super. 2005).

Febus first alleges that counsel's ineffectiveness caused him to enter an involuntary plea and that he was unaware of the consequences of a plea. This claim is clearly belied by the record. Febus testified on direct examination at his PCRA hearing that: (1) counsel met with him and discussed his options, i.e. entering a plea or going to trial, ***see*** N.T. PCRA Hearing, 4/16/12, at 8; (2) counsel explained what an "open plea" was, ***see id.*** at 9; (3) Febus understood the full consequences of his plea, ***see id.*** at 10; (4) Febus understood the possible penalties for his general plea to homicide, ***see id.***; and (5) Febus understood that the judge would determine his degree of guilt, ranging from manslaughter to first-degree murder, ***see id.*** at 11. Moreover, when asked what trial counsel had explained to him that Febus had not understood, Febus replied "I don't know." ***Id.***

Febus presented no evidence to support his ineffectiveness claims regarding the lack of a voluntary plea. To the contrary, his own testimony

demonstrated that counsel apprised him of his right to a trial, the nature of his plea, the fact that the judge would determine his degree of guilt, and the possible penalties to be imposed. In fact, Febus could point to no example of something he did not understand prior to entering his plea. Accordingly, these claims are meritless.

Febus next asserts that counsel was ineffective for failing to object to evidence of other crimes at the degree of guilt hearing. Febus presented no evidence as to this claim during his PCRA hearing and, accordingly, this issue must fail for lack of proof. Moreover, at the PCRA hearing, trial counsel testified for the Commonwealth that Febus' defense strategy – one of "imperfect self-defense" – required that the other crimes be brought into evidence. Specifically, Febus' defense was that he shot at the victim's car because he thought it contained an individual named "Butch," with whom he and his friends had a long-standing dispute, and that he thought "Butch" was after him. Counsel testified that Febus was "[a]bsolutely" in agreement with this strategy. *Id.* at 25. Because counsel had a reasonable strategic basis for allowing evidence of other crimes to be presented, he cannot be deemed to have been ineffective. *Pierce, supra.* Accordingly, this claim fails.

Finally, Febus asserts that trial counsel was ineffective for failing to call various witnesses at his degree-of-guilt hearing. Febus did not raise this issue in his PCRA petition, but did so for the first time at the PCRA hearing.

Specifically, Febus claims that trial counsel should have presented the testimony of “Butch[’s] cousin and Butch[’s] brother [Moses Figueroa]” in order to demonstrate that “Butch was at the scene,” thus corroborating Febus’ story that he believed he was shooting at “Butch” when he shot at the victim.

Here, a review of the degree-of-guilt hearing transcript reveals that Moses Figueroa did testify on behalf of the Commonwealth and was cross-examined by defense counsel. **See** N.T. Degree-of-Guilt Hearing, 7/10/07, at 76-95. During the course of his testimony, Figueroa acknowledged a prior, ongoing dispute between “Butch” and Febus’ friend, Daniel Lugo. He also testified that he was in a car with “Butch” at the scene of the shooting on the night in question. Thus, the testimony Febus sought to elicit from Figueroa was actually placed on the record.

Moreover, any additional testimony regarding “Butch’s” presence at the scene would have been cumulative to Febus’ own testimony. **See** N.T. Degree-of-Guilt Hearing, 7/11/07, at 75-82. As counsel cannot be deemed ineffective for failing to pursue cumulative evidence, this claim is meritless. **Commonwealth v. Hall**, 701 A.2d 190, 300 (Pa. 1997).

Order affirmed. Petition to withdraw as counsel granted.