NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JEAN SAXON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1816 EDA 2012

Appeal from the PCRA Order May 18, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0002168-2005

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J. Filed: February 26, 2013

Jean Saxon appeals from the order of the Court of Common Pleas of Bucks County dismissing her petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-46. After careful review, we affirm.

Saxon was convicted of first-degree murder[1] and other charges related to the death of her estranged husband, Jerry Saxon ("Victim") by insulin overdose. Saxon had been engaged in an ongoing extra-marital affair with John Armstrong, a co-worker at the nursing home at which Saxon worked. During the course of their investigation, police sought and obtained a search

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 2502(a).

warrant for Saxon's computer for the purpose of performing a forensic computer analysis to find "e-mails, word documents and internet history . . . relevant to the events leading up to the incident involving [Victim] as well as the relationship/communications between John Armstrong, Jean Saxon and [Victim]." Affidavit of Probable Cause, 3/31/03, at 4.

After a jury convicted Saxon, on November 21, 2005 the Honorable David E. Heckler sentenced her to life imprisonment for first-degree murder.[2] Trial counsel, John J. Fiorvanti, Esquire, was granted leave to withdraw his representation on December 9, 2005 and Courtney B. Kirschner, Esquire, of the Bucks County Public Defender's Office was appointed to represent Saxon. Attorney Kirschner filed and litigated Saxon's post-sentence motions, which were denied by order dated May 23, 2006.

On June 20, 2006, Saxon filed a timely notice of appeal to this Court. Her judgment of sentence was affirmed by memorandum decision filed August 31, 2007. ***See Commonwealth v. Saxon***, 1622 EDA 2006 (Pa. Super. 2006). Saxon's petition for allowance of appeal was denied by the Pennsylvania Supreme Court on January 17, 2008.

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[2] Saxon was also sentenced to nine months to seven years' imprisonment for theft by unlawful taking or disposition, 18 Pa.C.S.A. § 3921; one to six months' imprisonment for possession of a controlled substance, 35 P.S. § 780-113(a)(16); and no further penalty for tampering with evidence, 18 Pa.C.S.A. § 4910(1). All sentences were imposed to run consecutively.

Saxon filed a *pro se* PCRA petition on April 23, 2008. The PCRA court appointed Ronald Elgart, Esquire, to represent her on April 25, 2008. Thereafter, Saxon filed three additional PCRA petitions. Upon motion by Attorney Elgart, Stuart Wilder, Esquire, was appointed to represent Saxon by order dated January 26, 2010. The PCRA court granted Attorney Wilder leave to amend Saxon's previous PCRA petitions; the amended petition was filed on January 12, 2011. After a videoconference hearing on April 26, 2011, the PCRA court issued a briefing schedule. After considering the testimony elicited at the hearing, as well as the arguments of the parties, the PCRA court denied Saxon relief by order dated May 18, 2012.

This timely appeal follows, in which Saxon raises the following issues for our review:

> 1. Was trial counsel ineffective when he failed to effectively raise, present available proof, and properly preserve for appellate review the issue that the search of [Saxon's] computer by William Applegate exceeded the scope of the warrant and violated U.S. Const. Amend. IV and Pa. Const. Art. I, § 8 when Applegate searched for evidence of [Saxon's] knowledge about insulin, and not only for emails[?]
>
> 2. Was post-trial counsel ineffective when she failed to preserve for appellate review the illegally excessive scope, under U.S. Const. Amend. IV and Pa. Const. Art. I, § 8, of the search of [Saxon's] computer nor trial counsel's ineffectiveness in failing to introduce any evidence on the matter[?]

Brief of Appellant, at 3.

This Court's standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by evidence of record and is free of legal error. ***Commonwealth v. Burkett***, 5 A.3d 1260, 1267 (Pa. Super. 2010) (citations omitted). 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. ***Id.*** We may affirm a PCRA court's decision on any grounds if it is supported by the record. ***Id.***

As both of Saxon's claims relate to the ineffectiveness of prior counsel, we also note that our standard of review when faced with a claim of ineffective assistance of counsel is well-settled. First, counsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant. ***Commonwealth v. Thomas***, 783 A.2d 328, 332 (Pa. Super. 2001) (citation omitted). In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. ***Commonwealth v. Turetsky,*** 925 A.2d 876, 880 (Pa. Super. 2007) (citation omitted). A petitioner must show: (1) that the underlying claim has merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors or omissions of counsel, there is a

reasonable probability that the outcome of the proceedings would have been different. ***Id.*** (citation omitted). The failure to prove any one of the three prongs results in the failure of petitioner's claim. "The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1041-42 (Pa. Super. 2007), citing ***Commonwealth v. Pierce***, 645 A.2d 189, 194 (Pa. 1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Id.***, citing ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa. Super. 2004).

Both of Saxon's claims involve the ineffectiveness of prior counsel for failing to raise the excessive scope of Agent Applegate's search of her computer. With respect to trial counsel, Saxon claims that, although counsel raised the issue of the scope of the search during the pretrial motion stage, he failed to present evidence, i.e. Agent Applegate's written report, in support of that claim. Saxon asserts that the evidence obtained from the computer search would have been suppressed had counsel properly litigated the issue. Saxon also claims that post-trial counsel (who represented Saxon on post-sentence motions and direct appeal) failed to preserve for appellate review the excessive scope of the search as well as trial counsel's ineffectiveness for failing to introduce Agent Applegate's report.

Saxon's claims are both premised on her assertion that Agent Applegate, in conducting his forensic investigation of the computer, exceeded the scope of the warrant by not only searching for e-mails between Saxon and Armstrong, but also for internet searches involving insulin and other related words.

The report on which Saxon bases her claim revealed, in relevant part, the following:

> After a review of the evidence provided, and speaking with the Investigating Detective, this examiner has concluded the following:
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> That a subject had utilized the computer examined to conduct an Internet search with the Google search engine using the following keywords and/or key phrases on Sunday March 16, 2003, "insulin," "insukin [sic] ingested dangerous," "insulin ingested dangerous," "can ingesting insulin be dangersous [sic]," and "can ingesting insulin be dangerous."
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> That . . . the results of the Google search for "insulin ingested dangerous" were created on the computer on Sunday March 16, 2003 at 8:30 PM.
>
> That . . . the subject conducting these searches may have reviewed over 60 of the results returned by the search for "insulin ingested dangerous."
>
> That . . . a subject conducted an Internet keyword/phrase search for "positive Babinski," a medical term.
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> That the computer examined was utilized by someone to conduct Internet searches for information relating to "glucose intolerance," "insulin and its metabolic effects," "what causes hypoglycemia," "diabetes," and drugs to lower blood sugar[.]

Computer Forensics Examination Report, at 4.

In Saxon's pre-trial omnibus motion, counsel asserted that the search of Saxon's computer exceeded the scope of the warrant. Omnibus Pretrial Motion, 7/15/05, at ¶ 19. In ruling on the motion after oral argument, the court stated as follows:

> **I gather that some of the materials found on the computer memory and which the Commonwealth would seek to offer at trial don't specifically relate to e-mail exchanges between Armstrong and the defendant, but to information about searches which the defendant or someone may have performed on this computer.** It seems to me that it might have been too attenuated for the Commonwealth to seek a search warrant simply in the hopes or on the off chance that they might stumble over such information, although certainly the circumstances which are detailed in this affidavit suggest the strong possibility, shall we say, that the defendant employed the method of insulin injection. However, as I understand the cases – and I'm sure the case law will evolve over time as we deal with this relatively new technology – those who have appropriate probable cause to search for particular communications on computers, when they are lawfully being where they are – in a sense we're talking about cyberspace rather than entering a room—encounter other items, if you will, in plain view which have evidentiary significance, they may properly discover, seize, these other pieces of information.

N.T. Suppression Hearing, 8/15/05, at I-91-92 (emphasis added).

In explaining its ruling, the court clearly demonstrated its awareness of Saxon's assertion regarding the allegedly unauthorized seizure of internet

searches during the forensic examination of her computer. Accordingly, as Agent Applegate's report would not have given the court substantially more information than it already possessed, Saxon is unable to demonstrate that trial counsel's failure to introduce the report was in any way prejudicial, that the evidence would have been suppressed, or that the outcome of her trial would have differed had the report been introduced. ***Turetsky***, ***supra***. As such, this claim is meritless.

Saxon next claims that post-trial counsel, Courtney Kirschner, Esquire, was ineffective for: (1) failing to raise trial counsel's ineffectiveness and (2) failing to preserve for appellate review Saxon's claim regarding the excessiveness of the search. For the reasons that follow, we conclude that post-trial counsel was not ineffective.

We begin by noting that ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), held that:

> as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review. Thus, any ineffectiveness claim will be waived only after a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity.

Id. at 738. Accordingly, post-trial counsel did not waive Saxon's ineffectiveness claims regarding trial counsel by failing to raise them, either in post-sentence motions or on direct appeal. Moreover, as we determined ***supra***, trial counsel was not, in fact, ineffective for failing to introduce Agent

Applegate's written report. As counsel cannot be deemed ineffective for failing to pursue a meritless claim, ***Taylor***, ***supra***, this claim fails.

Saxon also claims that post-trial counsel failed to preserve the "scope of the search" issue for appellate review. In post-sentencing motions and on direct appeal, counsel challenged the warrant itself, asserting that it was not supported by probable cause, lacked specificity and was overly broad. The trial court denied post-sentence motions and this Court subsequently concluded that the claim was without merit and affirmed the decision of the suppression court. Thereafter, our Supreme Court declined to grant allowance of appeal.

Attorney Kirschner testified at the PCRA hearing that, in preparing for post-trial proceedings, Saxon presented a variety of potential issues to raise. Attorney Kirschner testified that she "attempted to sort out which ones I thought were meritorious and which ones were not likely to lead anywhere." N.T. PCRA Hearing, 4/26/11, at 32. As to the suppression claim at issue here, Attorney Kirschner testified that she did not raise the scope of the search itself because:

> [M]y reading of the warrant and accompanying affidavit was that the warrant itself did not limit the scope of the search in any way and, therefore, it would have been hard to argue that the search exceeded the scope, if the scope itself hadn't been sufficiently narrowed.

Id. at 38. Indeed, the investigators, in the probable cause affidavit, sought permission to obtain "evidence **including but not limited to e-mails,**

word documents and internet history [to] provide investigators with additional evidence relevant to the events leading up to the incident involving Jerry Saxon as well as the relationship/communication between [Armstrong, Saxon and Victim]." Probable Cause Affidavit, 3/31/03, at 5 (emphasis added). Arguably, this language was broad enough to include in its scope not only e-mails between Saxon and Armstrong, but any internet searches Saxon may have performed using keywords or phrases relating to insulin.[3] Accordingly, we conclude that Attorney Kirschner had a reasonable basis for her decision to challenge the warrant rather than the search. ***Turetsky***, ***supra***; ***Taylor***, ***supra***.

Order affirmed.

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[3] Indeed, we note that on direct appeal, this Court acknowledged that the warrant could have been construed as overly broad, noting that "as stated, the warrant and its attachment would authorize not just an extensive search for e-mail-related data but for any information of any type contained in the computer. . . . In this sense, we find the warrant to be lacking in particularity and overly broad." ***Saxon***, 1622 EDA 2006 at 22. Although this Court went on to find that the warrant was, in fact, sufficiently particularized, this acknowledgment demonstrates that Attorney Kirschner's strategy to attack the warrant, and not the search, was not an unreasonable one.