NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JAMEEN WARREN,	:	
	:	
Appellant	:	No. 1981 EDA 2008

Appeal from the PCRA Order entered June 4, 2008
In the Court of Common Pleas of Delaware County
Criminal No.: CP-23-CR-0005176-2003

BEFORE: BENDER, ALLEN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MAY 10, 2013**

This appeal of Appellant, Jameen Warren, returns to this Court after remand by the Pennsylvania Supreme Court on September 12, 2011.[1] The

* Former Justice specially assigned to the Superior Court.

[1] Attorney Scott D. Galloway, Esq., was appointed to represent Appellant in the underlying Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546, proceedings and in the instant appeal. Initially, Attorney Galloway filed an appellate brief on Appellant's behalf. Appellant then filed a *pro se* petition with this Court for remand, alleging that the brief was incomplete and therefore Attorney Galloway was ineffective. This Court directed counsel to respond to Appellant's *pro se* petition, pursuant to ***Commonwealth v. Battle***, 879 A.2d 266 (Pa. Super. 2005), which was then in effect. ***See Battle***, 879 A.2d at 269-70 (stating that when, on appeal, represented defendant files *pro se* motion alleging ineffectiveness of appellate counsel, counsel is required to petition Superior Court for remand and provide evaluation of *pro se* claims, and Superior Court will then determine whether remand for appointment of new counsel is required). Attorney Galloway filed the required petition for remand. In a published opinion filed August 10, 2009, this Court found Attorney Galloway's petition was deficient, vacated the underlying order denying PCRA relief, and remanded for the

appeal is taken from the order of the Delaware County Court of Common Pleas dismissing Appellant's timely filed, first Post Conviction Relief Act[2] ("PCRA") petition alleging trial counsel's ineffectiveness. His attorney, Henry

---

appointment of new counsel, who could file a new PCRA petition. ***Commonwealth v. Warren***, 979 A.2d 920 (Pa. Super. 2009). The Commonwealth appealed.

On September 12, 2011, the Pennsylvania Supreme Court vacated our decision and remanded to this Court for proceedings consistent with ***Commonwealth v. Jette***, 23 A.3d 1032 (Pa. 2011), which had been issued in the interim. ***Commonwealth v. Warren***, 29 A.3d 367 (Pa. 2011); ***see Jette***, 23 A.3d 1032 (overruling ***Battle*** and reiterating proper response to *pro se* pleading is to refer pleading to counsel and take no further action on *pro se* pleading unless counsel forwards motion).

Upon remand to this Court, Attorney Galloway filed an application to withdraw as counsel, which we granted. The trial court then appointed present counsel, Henry DiBenedetto Forrest, Esq., to represent Appellant.

An appellate brief was initially due on March 23, 2012. Three days **after** this deadline, Attorney Forrest filed an application for an extension of time. This Court granted an additional sixty days. Five days before the extended deadline, counsel filed a petition for leave to amend the Pa.R.A.P. 1925(b) statement. On June 12, 2012, this Court granted the petition, and directed the PCRA court to file a Pa.R.A.P. 1925(a) opinion responding to the amended statement.

After the PCRA court provided the responsive opinion, this Court, on July 9, 2012, notified Attorney Forrest that an appellate brief was due in six weeks, on August 20th. Two days **after** this deadline, counsel filed an application for extension of time. This Court granted an extension to October 19th. Three days **after** this deadline, Attorney Forrest requested yet another extension, to December 18th. Six days before that deadline, Attorney Forrest filed the instant ***Turner***/***Finley*** petition to withdraw. ***See Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

[2] 42 Pa.C.S. §§ 9541-9546. The Commonwealth has not filed an appellee's brief.

DiBenedetto Forrest, Esq., has filed a ***Turner***-***Finley*** petition with this Court to withdraw from representation. We grant the petition to withdraw and affirm the PCRA order.

Appellant was convicted by a jury of second-degree murder, robbery, robbery of a motor vehicle, and related charges, stemming from a shooting and robbery in a laundromat. On November 21, 2005, the trial court imposed a sentence of life imprisonment for second-degree murder and an aggregate term of twenty to forty years' imprisonment for the remaining charges. Appellant appealed, and on July 3, 2007, this Court affirmed the judgment of sentence.[3] Appellant did not seek allowance of appeal with our Supreme Court.

On December 17, 2007, Appellant filed the instant timely PCRA petition, *pro se*. Attorney Galloway was appointed, and the docket indicates that he filed an amended petition on January 31, 2008.[4] After issuing notice

[3] ***Commonwealth v. Warren***, No. 1027 EDA 2006 (unpublished memorandum) (Pa. Super. filed July 3, 2007). Appellant's claim on direct appeal was that the trial court erred in denying suppression of his statement to police because the police did not have probable cause to arrest him and because his statement was not voluntary.

[4] However, there is no counseled, amended PCRA petition in the certified record. Nevertheless, all of the issues raised in Attorney Forrest's ***Turner***/***Finley*** letter were raised in a *pro se* memorandum of law attached to Appellant's *pro se* PCRA petition.

of intent to dismiss without a hearing,[5] the PCRA court dismissed Appellant's petition on June 4, 2008.

Appellant timely took this appeal on June 26, 2008. We have summarized the procedural history of this appeal, ***supra***, at footnote 2. Attorney Forrest has filed with this Court an application to withdraw his appearance, as well as a letter stating Appellant wishes to argue trial counsel was ineffective for failing to: (1) file a pre-trial motion to suppress the custodial statement Appellant gave to police; (2) request a jury instruction that the jury could consider the lack of a voluntary confession to police; and (3) "employ the services of an expert to testify about the effects of being under the influence of crack cocaine in reference to [Appellant's] actions and/or statements." Attorney Forrest's Ltr., 12/11/12 (hereinafter "***Turner***/***Finley*** Letter"), at 3. Appellant has not filed a response, and, as stated above, the Commonwealth has not filed an appellee's brief.

Preliminarily, we review Attorney Forrest's petition to withdraw. ***See Commonwealth v. Widgins***, 29 A.3d 816, 817 (Pa. Super. 2011). In requesting withdrawal from representation in a PCRA matter, counsel must: file a "no merit" letter "detailing the nature and extent of his review," "listing each issue the petitioner wished to have reviewed," and explaining "why the petitioner's issues were meritless." ***Id.*** at 818. Counsel must also

> forward to the petitioner a copy of the application to

[5] ***See*** Pa.R.Crim.P. 907(a).

> withdraw that includes (i) a copy of both the "no-merit" letter, and (ii) a statement advising the PCRA petitioner that, in the event the trial court grants the application of counsel to withdraw, the petitioner has the right to proceed *pro se*, or with the assistance of privately retained counsel.

Id. (citations omitted). If we conclude counsel has complied with these requirements, we conduct an independent review of the record and determine whether we agree with counsel that the PCRA petition is meritless. ***Id.*** at 819.

In the instant matter, Attorney Forrest's application to withdraw avers he "conducted a thorough review of the record[,] all Court records available[, and] the potential legal issues, including research of the applicable law[.]" Attorney Forrest's Application to Withdraw Appearance, at 2. He concludes he "determined that a complete lack of claim(s) and/or meritorious issue(s) exist for review." ***Id.*** Attorney Forrest attaches a copy of a letter he sent to Appellant, which advised Appellant that he found no merit to any of his PCRA claims, he intended to withdraw as his counsel, and that Appellant could pursue his claims or other issues *pro se* or through privately retained counsel. Attorney Forrest also states he served Appellant with a copy of his application to withdraw and "no-merit" letter. Finally, Attorney Forrest's ***Turner***/***Finley*** letter identifies three issues that Appellant wishes to pursue, summarizes relevant legal authority, and discusses why each issue is meritless. Accordingly, we find Attorney Forrest has complied with the ***Turner***/***Finley*** requirements, and now review the merits of

Appellant's claims. ***See Widgins***, 29 A.3d at 819.

This Court has stated:

> The standard of review for a PCRA court's order 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 on appeal unless there is no support for the findings in the certified record.
>
> To be entitled to relief under the PCRA on a claim of ineffective assistance of counsel, the petitioner must prove: (1) that the underlying legal claim is of arguable merit; (2) that counsel's action or inaction had no reasonable strategic basis designed to effectuate his client's interests; and (3) prejudice, to the extent that there is a reasonable probability that the outcome of the proceedings would have been different if not for counsel's error. The petitioner must satisfy all three prongs of this test to obtain relief under the PCRA.

Commonwealth v. Williams, 959 A.2d 1272, 1277 (Pa. Super. 2008) (citations omitted).

The first issue in Attorney Forrest's ***Turner***/***Finley*** letter is whether trial counsel was ineffective for failing to seek suppression of Appellant's custodial statements. ***Turner***/***Finley*** Letter at 6. We find that contrary to the premise of Appellant's claim, trial counsel **did** litigate this issue. Counsel filed a pre-trial omnibus motion which requested suppression of Appellant's statement to police, specifically on the grounds that his arrest was illegal, he was interrogated before given ***Miranda***[6] warnings and he did not waive his constitutional rights, and the time between his arrest and preliminary

[6] ***See Miranda v. Arizona***, 384 U.S. 436 (1966).

arraignment exceeded six hours. Appellant's Am. Omnibus Mot., 1/27/04, at 3-5 (unpaginated). The court held an evidentiary hearing and denied the motion. Order, 10/26/04. Trial counsel then filed a motion to reconsider this ruling, upon which the trial court held another hearing. ***See*** N.T., 10/31/05; Order, 4/8/05. Moreover, the suppression ruling was challenged on direct appeal. Accordingly, we find the underlying issue of Appellant's ineffectiveness claim has no merit and reject this claim.[7] ***See Williams***, 959 A.2d at 1277.

The second issue raised in Attorney Forrest's ***Turner***/***Finley*** letter is whether trial counsel was ineffective for failing to request a jury instruction that the jury should have considered the lack of a voluntary confession by Appellant to police. We note that "[a]t trial, [Appellant] disavowed his confession, claiming he had been subject to a good cop/bad cop interrogation where the 'bad cop' physically abused" him. ***Warren***, No. 1027 EDA 2006 at 6.

[7] In denying relief on this issue, the PCRA court reasoned that because the Superior Court ruled on the merits of Appellant's suppression claim on direct appeal, the issue was previously litigated. PCRA Ct. Op., 7/2/12, at 4; ***see*** 42 Pa.C.S. § 95473(a)(3) (requiring PCRA petition to plead and prove allegation or error was not previously litigated or waived). We disagree with this reasoning; while Appellant previously litigated the trial court's suppression ruling, he did not previously pursue a claim that counsel was ineffective. ***See Commonwealth v. Perry***, 959 A.2d 932, 936 (Pa. Super. 2008) (claim of ineffectiveness of counsel is discrete legal ground and not merely alternative theory in support of underlying issue that was raised on direct appeal). Nevertheless, we may affirm on any basis. ***See Commonwealth v. Charleston***, 16 A.3d 505, 529 n.6 (Pa. Super. 2011), *appeal denied*, 30 A.3d 486 (Pa. 2011).

The PCRA court opined, "[E]ven if defense counsel failed to request instructions, [Appellant] suffered no prejudice because the [trial] Court gave nearly four . . . pages of instructions to the jury concerning how to gauge the voluntariness of his confession." PCRA Ct. Op. at 5 (citing N.T., 9/30/05, at 129-33). We agree with this reasoning. [8] In particular we note this statement:

> [Y]ou may not consider this statement as evidence against [Appellant], unless you find that he made that statement voluntarily. This means that you must disregard the statement, unless you are satisfied by a preponderance of the evidence—and that means, unless you are satisfied that it is more likely than not that [Appellant] made the statement voluntarily. The word voluntary does have a special legal meaning[.]

N.T., 9/30/05, at 129. Because Appellant has failed to establish prejudice, we find no merit to his ineffectiveness claim. ***See Williams***, 959 A.2d at 1277.

---

[8] At trial, the Commonwealth presented evidence that after being transported to and arriving at the police station, Appellant "asked why he was there. He was told it was because of the laundromat shooting. [Appellant] began to cry and stated that he did not mean to do it and that the shooting was an accident." ***Warren***, No. 1027 EDA 2006 at 5. Appellant subsequently signed a ***Miranda*** warning form and gave a confession that was audio taped. In its instruction concerning the voluntariness of Appellant's statement to police, the trial court acknowledged the testimony about Appellant's "spontaneous statements that were not response[s] to police questioning[.]" N.T., 9/30/05, at 129. The court further the jury that "[p]olice questioning includes not only direct questioning, but also[ ] any conduct or tactic . . . intended, expected or reasonably likely to bring about admissions[,]" and that the jury "should find that [Appellant's] statement was voluntary, if [it finds] it was made spontaneously or not in response to police questioning." ***Id.*** at 130.

The final issue in the ***Turner***/***Finley*** letter is whether trial counsel was ineffective for failing to employ an expert to opine about Appellant's custodial statement when he was allegedly under the influence of crack cocaine at that time. The PCRA court "denied this argument without an evidentiary hearing, [on the ground that Appellant] did not present any documents or affidavits in his original or amended PCRA petition that he was under the influence of crack at the time of his statement to police." PCRA Ct. Op.at 4-5.

Furthermore, we note that at trial, Appellant presented no evidence that he was under the influence of any drug at the time he made a statement to police. He did not testify at trial. In his relatively short direct examinations of his three witnesses,[9] the sole testimony about his drug use came from his girlfriend's mother, who stated she was not aware that Appellant had a substance abuse problem, and that her daughter, Appellant's girlfriend, told her that Appellant smoked reefer. N.T., 9/28/05, at 182-83. This testimony in no way establishes Appellant's intoxication at the time he was interrogated by police. Thus, we hold the underlying claim of Appellant's ineffectiveness issue is meritless; any expert opinion about his

[9] Appellant called Corrections Officer Damon Trail, who patrolled the county prison where Appellant was incarcerated, and called the customer in the laundromat, Ann Flood, as if on direct examination. ***See*** N.T., 9/28/05, at 178-80, 205-09.

alleged drug intoxication at the time of his custodial statement would not have been supported by the evidence and would not have been relevant.

Furthermore, on direct appeal, this Court rejected Appellant's claim "that his confession was not voluntary because he was under the influence of crack cocaine at the time[:]"

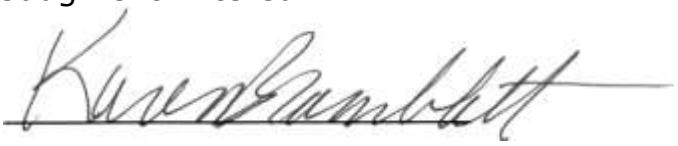
> Contrary to [Appellant's] assertion, there is no evidence that he was under the influence of any illegal substance when he spoke with the police. While we accept as a fact that [Appellant] smoked crack cocaine the night/early morning before the crime, we note that [Appellant] was not taken into custody until the late morning/early afternoon of the day of the crime. He was not questioned by the police until the mid-afternoon and did not give his formal statement until late afternoon. There is no dispute that [Appellant] did not smoke any crack while in police custody.
>
> At the suppression hearing, Lieutenant Gibney, the police officer who interviewed [Appellant], testified that [Appellant] showed no signs of being under the influence of drugs. [Appellant] presented no evidence at the suppression hearing that he was intoxicated.

Warren, No. 1027 EDA 2006 at 10-11. We find no merit in Appellant's claim.

For the foregoing reasons, we affirm the order of the PCRA court denying relief.

Order affirmed. Counsel's application to withdraw from representation granted.

Judgment Entered.



Prothonotary

Date: 5/10/2013