

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
JAMAL RASHEED,		
Appellant		No. 2009 WDA 2011

Appeal from the PCRA Order December 1, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0005464-2003

BEFORE: STEVENS, P.J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J.

Filed: February 25, 2013

Appellant Jamal Rasheed appeals from the December 1, 2011 Order entered by the Court of Common Pleas of Allegheny County which dismissed Appellant's petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. Appellant claims his trial and appellate counsel were ineffective in several respects. We affirm.

In 2005, Appellant was convicted with the murder of Michael Schuffert. After his sentence was affirmed on direct appeal, Appellant filed this PCRA petition. The PCRA court summarized the facts of this case as follows:

On the evening of February 7, 2003, Mike Schuffert had been drinking and was becoming angry with his former friend, Chad Kosta, about Kosta's attempt to establish a romantic relationship with one, if not both, of Schuffert's former

* Former Justice specially assigned to the Superior Court.

girlfriends, Angela Otlano and Raquel Ulicny. Schuffert discovered that there was a party that was taking place at Brian Blakely's home where both of these girls were in attendance, as was Chad Kosta. Schuffert decided that he was going to confront Kosta about his relationship with Schuffert's ex-girlfriends and persuaded a friend of his, Robert Boyd, to accompany him to Blakely's house. Schuffert wanted Boyd to provide protection for him since he intended to fight Kosta about his perceived relationships with these two young women.

Schuffert and Boyd walked several miles until they came to the Blakely home and Schuffert began pounding on the door demanding that he be let in since he wanted to fight with Kosta. When he was not permitted inside the residence, Schuffert only became louder and more insistent in wanting to beat Kosta up but left the residence when Mrs. Blakely came to the front door and told him that she was going to call the police if he did not leave. Despite telling Schuffert that the police were going to be called, Brian Blakely called [Appellant] and asked him to come over and help get Schuffert away from the residence. [Appellant,] who is six feet four, two hundred and seventy pounds, had been drinking all day with his girlfriend and smoking marijuana blunts. After receiving the phone call, he armed himself with a Taurus revolver that he had in a holster. [Appellant] left his residence and then walked approximately one block until he was in an alleyway near Blakely's home. Also in the alley were Schuffert and Boyd who were on their way back to Schuffert's residence. When Schuffert saw [Appellant], he said "Who is this?" to which [Appellant] responded, "The killer, mother fucker," and then he shot Schuffert one time in the head. Boyd ran to the West Mifflin Volunteer Fire Department to tell them what had happened.

The West Mifflin Police were dispatched to the fire hall and then Boyd took them to the alley where his friend had been shot. Paramedics were called, however, Schuffert was unresponsive and he was transferred to Presbyterian University Hospital, where he died two days later from the gunshot wound to his head. As other police officers were leaving the West Mifflin Police station to respond to the shooting scene, [Appellant] walked into the police station and stated that he was the individual who had shot Schuffert. After being given his Miranda warnings, [Appellant] agreed to give a statement to the police. In that statement, [Appellant] acknowledged that while he was

the shooter, he did not do so intentionally since he was trying to scare Schuffert and that when he was attempting to pull the gun out of the holster, that it accidentally went off.

Trial Court Opinion, 7/5/12, at 3-5.

On February 1, 2005, a jury found Appellant guilty of third-degree murder, but acquitted Appellant of first-degree murder. On May 2, 2005, the trial court sentenced Appellant to thirteen (13) to twenty-six (26) years imprisonment, followed by a consecutive five (5) year term of probation with random drug screening. On May 4, 2005, Appellant filed post-trial motions seeking a new trial and a modification of his sentence, which the trial court subsequently denied on September 12, 2005.

After Appellant filed two *pro se* notices of appeal, the trial court replaced his public defender with court-appointed counsel. Appellant filed a Supplemental Post-Sentence Motion *nunc pro tunc* which the trial court denied. On October 24, 2005, Appellant filed a timely notice of appeal. This Court affirmed the judgment of sentence, and on April 1, 2009, our Supreme Court denied Appellant's Petition for Allowance of Appeal.

On March 9, 2010, Appellant filed a timely *pro se* PCRA petition, asserting the ineffectiveness of his prior trial and appellate counsel. The trial court appointed Appellant new counsel who filed an Amended PCRA Petition on Appellant's behalf. After an evidentiary hearing, the PCRA court dismissed Appellant's petition on December 1, 2011. Appellant filed a timely notice of appeal and complied with the trial court's direction to file a Concise Statement of Errors Complained of on Appeal.

In his brief, Appellant raises the following issues for our review:

- I. Whether prior counsel were ineffective in failing to raise and preserve an objection to the sentence on the ground that the court impermissibly considered the jury's perceived merciful verdict in imposing sentence.
- II. Whether prior counsel were ineffective in failing to raise and preserve an objection to the sentence on the ground that the court considered other undisclosed and speculative "sinister" activity in imposing sentence.
- III. Whether prior counsel were ineffective in failing to raise and preserve an objection to the sentence on the ground that the court failed to fully consider and weigh important existing mitigating factors in imposing sentence.

Appellant's Brief at 5.

In reviewing an order dismissing a petition under the PCRA, our standard of review is as follows:

We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of the PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. This Court may affirm a PCRA court's decision on any grounds if the record supports it. Further, we grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. However, we afford no such deference to its legal conclusions. Where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review plenary.

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa. Super. 2012) (citations omitted).

Appellant raises several challenges to the effectiveness of his trial and appellate counsel. Such claims are governed by the following standard:

Counsel is presumed effective and will only be deemed ineffective if the petitioner demonstrates that counsel's performance was deficient and he was prejudiced by that deficient performance. Prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

To properly plead ineffective assistance of counsel, a petitioner must plead and prove: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act. If a petitioner fails to plead or meet any elements of the above-cited test, his claim must fail.

Id. at 1194-1195, quoting ***Commonwealth v. Burkett***, 5 A.3d 1260, 1271-1272 (Pa. Super. 2010).

Appellant argues that prior counsel were ineffective in failing to object to the sentencing court's impermissible consideration of 1) the jury's perceived merciful verdict and 2) other "undisclosed and speculative sinister activity." Appellant's Brief, at 5. It is well-established that "sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." ***Commonwealth v. Bowen***, 55 A.3d 1254, 1263 (Pa. Super. 2012) (citation omitted). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will." ***Commonwealth v. Bricker***, 41 A.3d 872, 875 (Pa. Super. 2012) (citation omitted).

Appellant specifically claims that his counsel should have asserted that the trial court relied on impermissible considerations in imposing his sentence. As a defendant does not have the automatic right to appeal the discretionary aspects of sentence, Appellant would have been required to comply with several procedural steps to raise this issue, such as including in his direct appeal brief a statement raising a substantial question as to whether the court properly considered the sentencing guidelines. **Downing**, 990 A.2d at 792. A claim that the trial court based its sentence on the consideration of an impermissible factor constitutes a substantial question. **Commonwealth v. Matroni**, 923 A.2d 444, 455 (Pa. Super. 2007). Thus, as Appellant's counsel would have been able to raise this claim on direct appeal, we proceed to the merits of this ineffectiveness claim.

A sentence is invalid if the record discloses that the sentencing court may have relied in whole or in part upon an impermissible consideration. This is so because the court violates the defendant's right to due process if, in deciding upon the sentence, it considers unreliable information, or information affecting the court's impartiality, or information that it is otherwise unfair to hold against the defendant.

Commonwealth v. Downing, 990 A.2d 788, 793 (Pa. Super. 2010), quoting **Commonwealth v. Karash**, 452 A.2d 528, 528-29 (Pa. Super. 1982). However, a trial court is "permitted to consider all reasonable inferences derived from the evidence presented at trial." **Downing**, 990 A.2d at 793 (citing **Commonwealth v. Druce**, 796 A.2d 321 (Pa. Super. 2002)).

At the sentencing hearing, the prosecutor expressed his belief that the jury had shown Appellant leniency in choosing to convict him of the lesser charge of third-degree murder:

It's the Commonwealth's position, Judge, that any mitigation that [Appellant] was entitled to was granted to him in this case. The witness in the case that was present at the time the shot was fired indicated that the words that [Appellant] had used prior to shooting Michael Schuffert. He identified himself, he said, ["it's the killer, mother fucker."] There's no doubt, Judge, that at that point what [Appellant] had in mind was nothing other than shooting Michael Schuffert. I believe that the jury found mitigation from the alcohol that [Appellant] had ingested earlier that evening and found that that somehow ameliorated the specific intent to kill down to third degree murder.

N.T. Sentencing, 5/2/05, at 22. The prosecutor then asked the trial court to sentence Appellant to twenty to forty years imprisonment, which constituted the statutory maximum. After the parties had presented argument at sentencing, the trial court stated "I think Mr. Tranquilli[, the prosecutor,] was correct in his observation that the jury showed you mercy in finding you guilty of third-degree murder." N.T. Sentencing, 5/2/05, at 25. The trial court subsequently indicated that it believed that "there [was] something more sinister that went on here than the testimony presented." N.T. Sentencing, 5/2/05, at 37. As noted above, the trial court imposed a standard range sentence of thirteen to twenty-six years imprisonment.

Although Appellant suggests the trial court based its sentence on improper factors, the record establishes otherwise. The trial court considered the facts surrounding the incident in determining the necessity of

the protection of the public, the gravity of the offense as it related to the victim and the community and Appellant's "redeeming qualities" that made him amenable to rehabilitation. The trial court also noted that Appellant had a zero prior record score. Moreover, the trial court employed a presentence report to fashion the sentence that it imposed upon Appellant. "Where the sentencing court had the benefit of a presentence investigation report, we can assume that the sentencing court was aware of the relevant information regarding the defendant's character and weighed those considerations along with any other mitigating factors." *Commonwealth v. Moury*, 992 A.2d 162, 171 (Pa. Super. 2010) (citation omitted).

We agree that the trial judge's statements that Appellant finds objectionable were mere observations and reasonable inferences in light of the record before the court. Although Appellant claimed he was summoned to settle a dispute peacefully at a friend's home without the need of police, he brought a loaded gun and immediately pointed it at the victim, who was significantly smaller than him. When the victim asked Appellant to identify himself, Appellant told him that he was "the killer, mother fucker" and shot the victim.

After reviewing these troubling facts, the trial court simply noted that the jury may have shown Appellant mercy as it may have believed Appellant's alleged intoxication prevented him from forming the specific intent required for a first-degree murder conviction. Further, while the trial court noted that Appellant had a zero prior record score and some

“redeeming qualities,” the trial court felt that the facts of the case revealed something more “sinister” had been going on. N.T. Sentencing, 5/2/05, at 37. We agree that the trial court made this observation in light of Appellant’s account of the shooting. ***See Downing***, 990 A.2d at 792 (finding trial court was permitted to infer that the defendant possessed an illegal firearm for criminal purposes even though the defendant was acquitted of the underlying robbery charges).

Moreover, the trial court’s observations and inferences no way impacted the sentence that Appellant received for his conviction for third degree murder. Although the Commonwealth recommended that Appellant be sentenced to the statutory maximum (twenty to forty years) in light of his conviction on the lesser offense, the trial court rejected this recommendation and chose to give Appellant a sentence in the lower portion of the standard range (thirteen to twenty-six years). Accordingly, we cannot find trial or appellate counsel ineffective for failing to raise this meritless claim.

In addition, Appellant contends prior counsel were ineffective in failing to assert that the Sentencing Court failed to appropriately consider and weigh Appellant’s lack of prior juvenile or adult criminal record, the pre-sentence report finding that he was amenable to rehabilitation, and his acceptance of responsibility and remorse for the loss of life in this case. We initially note that a claim that the trial court failed to consider certain mitigating factors does not constitute a substantial question that Appellant’s

attorneys could have raised on direct appeal. **See *Commonwealth v. Corley***, 31 A.3d 293 (Pa. Super. 2011).

Nevertheless, the record clearly shows the trial court considered Appellant's lack of a prior criminal record as an adult, his acknowledgement of responsibility for the death of the victim, and the fact that he had some "redeeming qualities" making him amenable to rehabilitation. The trial court chose to sentence Appellant to a period of incarceration below the middle of the standard range for sentencing. The trial court listened to witnesses who came forward on Appellant's behalf and had the benefit of a presentence report prepared in aid of sentencing. As stated above, we presume that a trial court that has reviewed a presentence report is aware of "relevant information regarding the defendant's character and [has] weighed those considerations along with any other mitigating factors." ***Moury***, 992 A.2d at 171. Accordingly, as the trial court did not abuse its discretion, we find that Appellant's counsel were not ineffective in failing to claim the trial court did not consider Appellant's mitigating factors in imposing his sentence.

After reviewing the record, briefs, and applicable law, we conclude the PCRA court did not err in finding Appellant's ineffectiveness claims to be meritless and in dismissing Appellant's PCRA petition.

Order affirmed.