NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. BRIAN DEHAVEN NEWTON, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1058 MDA 2013

Appeal from the PCRA Order May 14, 2013
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0001776-2009

BEFORE: BENDER, P.J.E., MUNDY, J., and JENKINS, J.

MEMORANDUM BY MUNDY, J.: **FILED JUNE 02, 2014**

Appellant, Brian DeHaven Newton, Jr. appeals *pro se* from the May 14, 2013 order dismissing his first petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546.[1] After careful review, we affirm.

The PCRA Court summarized the relevant facts and procedural history of this case as follows.

> On April 28, 2010, following a jury trial [Appellant] was found guilty of fifteen (15) drug[-] related charges. On August 3, 2010, [Appellant] was sentenced by [the trial c]ourt to an aggregate sentence of three (3) to six (6) years in a state [c]orrectional [i]nstitution with a consecutive period

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[1] The Commonwealth elected not to file a brief in this matter.

> of one (1) year supervision. On August 13, 2010, [Appellant] filed [p]ost-[s]entence [m]otions, which were denied by [the trial court on January 12, 2011]. On appeal, the Superior Court of Pennsylvania … remanded for resentencing. On December 2, 2011, [the trial c]ourt resentenced [Appellant] to two (2) years and (9) months to six (6) years with a consecutive period of one (1) year of supervision. [No additional appeals were filed by Appellant].
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> On December 6, 2012, [Appellant] filed a *pro se* Post Conviction Relief Act (PCRA) Petition. [Appellant] alleged three (3) issues: 1) trial counsel was ineffective for failing to give proper representation; 2) trial counsel was ineffective for failing to object to false and incorrect statements made by the prosecutor during closing arguments to the jury; and 3) trial counsel was ineffective for failing to object to the prosecutor[']s attempt to inflame the jury during closing arguments. On December 13, 2012, Donald Martino, Esquire, who was appointed to represent [Appellant], filed a Motion to Withdraw as Counsel and a Memorandum Pursuant to ***Turner***/***Finley***.[2] On April 16, 2013, [the PCRA court] agreed with Attorney Martino and granted the [m]otion to [w]ithdraw. In addition, the [PCRA c]ourt proposed the dismissal of the PCRA Petition and gave [Appellant] twenty (20) days to file an objection. On May [14], 2013, the [PCRA c]ourt dismissed the PCRA Petition as [Appellant] did not file any objections.

PCRA Court Opinion, 8/13/13, at 1-2.[3] Thereafter, on June 14, 2013, Appellant filed a timely notice of appeal.[4]

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[2] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

[3] We note that on May 14, 2013, Appellant filed a *pro se* petition for appointment of new counsel and amendment of PCRA petition, which was
(Footnote Continued Next Page)

On appeal, Appellant raises the following three issues for our review.

> I. Whether trial counsel provided ineffective assistance by failing to object to false and incorrect statements made by the prosecuting attorney during the closing arguments made to the jury[?]
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> II. Whether trial counsel provided ineffective assistance by failing to object to the prosecuting attorney's attempt to inflame the jury during closing arguments[?]
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> III. Whether trial counsel provided ineffective assistance of counsel by failing to investigate the case and present a proper defense[?]

Appellant's Brief at 5.

(Footnote Continued)

subsequently denied by the PCRA court on the basis that Appellant's PCRA petition had already been dismissed earlier that same day.

[4] Appellant's notice of appeal was timely pursuant to the prisoner-mailbox rule. ***See Smith v. Pa. Bd. of Probation and Parole***, 683 A.2d 278, 281 (Pa. 1996) (establishing that under the prisoner mailbox rule, timeliness of a filing from an incarcerated *pro se* party is measured from the date the prisoner places it in the institution's mailbox); ***Commonwealth v. Jones***, 700 A.2d 423, 426 (Pa. 1997) (applying ***Smith*** to "all appeals from *pro se* prisoners"). The burden to prove compliance is on Appellant. ***Smith***, ***supra*** at 282. Instantly, the final order was entered on May 14, 2013, therefore, Appellant's notice of appeal was due on June 13, 2013. The postmark on the envelope in the certified record containing his notice of appeal is June 11, 2013. Thus, Appellant's notice of appeal is timely under the prisoner mailbox rule. Additionally, on June 19, 2013, the PCRA court ordered Appellant to file, within 30 days, a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied. On August 13, 2013, in lieu of a formal opinion, the PCRA court adopted its reasoning set forth in its April 16, 2013 opinion dismissing Appellant's PCRA petition.

We begin by noting our well-settled standard of review. "On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted), *cert. denied*, ***Edmiston v. Pennsylvania***, 134 S. Ct. 639 (2013). "[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 PCRA court level." ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). "The PCRA court's credibility determinations, when supported by the record, are binding on this Court." ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted). "However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Id.***

Further, "[i]t is well-established that counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him." ***Koehler***, ***supra***, *citing* ***Strickland v. Washington***, 466 U.S. 668, 687-691 (1984). Our Supreme Court has articulated a three-pronged test to determine when an appellant has received ineffective assistance of counsel. "[A defendant] must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission." ***Id.***, *citing*

Commonwealth v. Pierce, 527 A.2d 973, 975 (Pa. 1987). A defendant must show that his claim meets all three prongs of the ***Pierce*** framework in order to be entitled to relief. ***Commonwealth v. Thomas***, 44 A.3d 12, 17 (Pa. 2012) (citation omitted). Furthermore, "[i]f an appellant fails to prove by a preponderance of the evidence any of the … prongs, the Court need not address the remaining prongs of the test." ***Commonwealth v. Fitzgerald***, 979 A.2d 908, 911 (Pa. Super. 2009), *appeal denied*, 990 A.2d 727 (Pa. 2010).

As Appellant's first two issues assert trial counsel was ineffective for failing to object to the prosecutor's statements during closing arguments, we will address them concomitantly. In his first issue, Appellant asserts that "trial counsel provided ineffective assistance by failing to object to false and incorrect statements made by the prosecuting attorney during the closing arguments made to the jury." Appellant's Brief at 13. Specifically, Appellant takes issue with the prosecutor's statement that "[t]he money mysteriously ends up on [Appellant]. You know what[,] that wasn't seen on cameras either, nobody saw that exchange either." ***Id.*** at 14, *quoting* N.T., 4/29/10, at 19. Appellant argues this is in direct contradiction to the affidavit of probable cause attached to the search warrant, which stated that C.I. Joseph Wyland was seen meeting with Appellant and an exchange was observed. Appellant's Brief at 14. Therefore, Appellant argues, "the prosecutor's improper remarks, and trial counsel's failure to object impeded the truth

determining process, and deprived [A]ppellant [] of a fair and impartial trial." ***Id.*** at 16.

Additionally, in his second issue Appellant argues, trial counsel was ineffective for failing to object to the prosecutor's "attempt to inflame the passions of the jury during closing arguments." ***Id.*** at 18. Specifically, Appellant argues the prosecutor tried to direct the jury's attention to "punishment of [Appellant] on the basis of society's victimization at the hands of drug dealers." ***Id.*** at 19. Appellant contends the "essence of the prosecutor's argument was to convince the jury to find [Appellant] guilty as a form of retribution for the ills inflicted on society." ***Id.***

> In accord with the long-standing principle that a "prosecutor must be free to present his or her arguments with logical force and vigor," this Court has permitted vigorous prosecutorial advocacy "as long as there is a reasonable basis in the record for the [prosecutor's] comments." ***Commonwealth v. Robinson,*** 581 Pa. 154, 864 A.2d 460, 516–17 (2004). Prosecutorial comments based on the evidence or reasonable inferences therefrom are not objectionable, nor are comments that merely constitute oratorical flair. [***Commonwealth v.***] ***Tedford***, [960 A.2d 1], 33 [(Pa. 2008)]. Furthermore, the prosecution must be permitted to respond to defense counsel's arguments. ***Id.*** Any challenged prosecutorial comment must not be viewed in isolation, but rather must be considered in the context in which it was offered. ***Robinson***, ***supra***, at 517.
>
> It is improper for a prosecutor to offer his or her personal opinion as to the guilt of the accused or the credibility of any testimony. ***Commonwealth v. DeJesus,*** 580 Pa. 303, 860 A.2d 102, 112 (2004). However, it is well within the bounds of proper

> advocacy for the prosecutor to summarize the facts of the case and then to ask the jury to find the accused guilty based on those facts. ***See id.***
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> The standard by which the court considers allegations of improper prosecutorial comments is a stringent one:
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> > Comments by a prosecutor constitute reversible error only where their unavoidable effect is to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant such that they could not weigh the evidence objectively and render a fair verdict.
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> ***Tedford, supra*** at 33 (citation omitted).

Commonwealth v. Hutchinson, 25 A.3d 277, 306-307 (Pa. 2011), *cert. denied*, ***Hutchinson v. Pennsylvania***, 132 S. Ct. 2711 (2012).

In assessing Appellant's contentions, the trial court notes that it "is unable [to] view in the record any false or incorrect statements made by the Commonwealth during closing." Trial Court Opinion, 4/16/13, at 5. Upon review of the record, we agree.

As to Appellant's first claim, that counsel was ineffective for failing to object to the prosecutor's statement during closing arguments that Appellant was not observed making an exchange with C.I. Wyland, we deem Appellant's argument meritless. Contrary to Appellant's assertion, the record does not contain testimony that Trooper Herbst observed an exchange.

> [Defense Counsel]: And in particular on the 28th, your duty was to observe [Appellant] or the confidential informant or both, correct?

[Trooper Herbst]: Yes.

[Defense Counsel]: And at no point you saw [Appellant] hand any drugs to [C.I. Wyland on the 28th]?

[Trooper Herbst]: No.

[Defense Counsel]: And on October 7th [the C.I.] gives you an empty bag, correct?

[Trooper Herbst]: Yes.

[Defense Counsel]: That potato chip bag, that had no drugs in it?

[Trooper Herbst]: Correct.

[Defense Counsel]: But the money was found on my client?

[Trooper Herbst]: Correct.

[Defense Counsel]: Ultimately as a result of all the evidence that you gathered, you requested a search warrant of my client's car?

[Trooper Herbst]: Yes.

[Defense Counsel]: And in searching my client's car did you discover any evidence of drugs?

[Trooper Herbst]: No.

[Defense Counsel]: There were no drugs in my client's car at all?

[Trooper Herbst]: None.

N.T., 4/27/10, at 50, 55.

Based on Trooper Herbst's testimony at trial, we cannot agree with Appellant that there is any merit to the assertion that the prosecutor made a false or improper statement during his closing remarks to the jury. Rather, the prosecutor stated, as the testimony had revealed, that no exchange was seen. N.T., 4/28/10, at 19. Accordingly, Appellant's first claim is meritless. Therefore, as failure to meet any prong of the ***Pierce*** test defeats a claim of ineffective assistance of counsel, Appellant's first issue on appeal fails.

Likewise, Appellant's alternative claim of ineffective assistance of counsel for failure to object to the prosecutor's closing argument also fails. In his brief, Appellant cites the following passage as an attempt to inflame the jury.

> [The Commonwealth]: They didn't just sit there and say there is a drug problem here in Lycoming County I'm going to stand by do nothing. We all sit back and say what is it we don't like about this area? The drugs. What are we doing about it? We're doing nothing.

Appellant's Brief at 18, *citing* N.T., 4/29/10, at 17.

In context, however, the prosecutor was responding to the defense's theory that the C.I.s in this matter were cooperating solely to get paid. Specifically, in Defense Counsel's closing statement he argued as follows.

> [Defense Counsel]: …[Trooper Herbst] indicated that as a result of this there will be some type of judicial benefit. He doesn't know what, but there is some type of benefit. But then [the C.I. is] also paid. He's getting paid to do this. If I'm going to get paid to testify I'm going to get paid to do these buys. Well, I need money to support my drug habit so what am I

> going to do? Well, I'm going to try to do as many buys as possible even if it means doing fake buys, even if it means implicating someone who did not commit a criminal offense and the way I'm going to get around doing this is I'm going to try to avoid detection from my surveillance team[.]

N.T., 4/29/10, at 6-7.

As a result, the Commonwealth responded to the defense attack on the C.I.'s credibility.

> [The Commonwealth]: … You got two people here, recovering addicts. They get involved with the drug scene. Do you think they're really getting paid a whole lot? Do you think they should be paid for what they're doing? Five times we're talking about contacts here with [the C.I.] and [Appellant], something like 150 bucks. Do you think that's worth it, thirty bucks for each time that you do this kind of work? But they did it and they were searched. They provided a service. They didn't just sit there and say there is a drug problem here in Lycoming County I'm going to stand by do nothing. We all sit back and say what is it we don't like about this area? The drugs. What are we doing about it? We're doing nothing. They're doing something about it and you're going to criticize them for that? I don't think so.

Id. at 17.

Based on the standard set forth by our Supreme Court in ***Hutchinson***, the prosecutor's comments must be read in their full context, and in the response to defense counsel's closing arguments. Viewing the closing arguments as a whole, Appellant's claim that the prosecutor's statement was intended to inflame the jury must fail. Specifically, we conclude Appellant was not prejudiced by said statement as it was in direct response to Defense

Counsel's statements regarding the motives of the C.I.s involved in the case. ***See Commonwealth v. Busanet***, 54 A.3d 35, 64 (Pa. 2012) (citations and quotation marks omitted) ("[t]o succeed on a claim of ineffective assistance of counsel based on trial counsel's failure to object to prosecutorial misconduct, the defendant must demonstrate that the prosecutor's actions violated a constitutionally or statutorily protected right[]"), *cert denied*, ***Busanet v. Pennsylvania***, 134 S. Ct. 178 (2013).

Finally, Appellant argues that trial counsel was ineffective for failing to investigate a proper defense. Appellant generally argues that "[h]ad trial counsel conducted proper pretrial preparation, counsel would have had issues to present that would've entitled [Appellant] to relief." Appellant's Brief at 20. More specifically, Appellant argues that Shannon Tutler, a passenger in Appellant's car on October 7, 2009 had testimony that "could have proved invaluable." ***Id.*** at 22. Further, Appellant asserts trial counsel did not familiarize himself with the case and therefore did not object to testimony made by C.I. Wyland which contradicted facts in the record. ***Id.***

An appellant's burden to show ineffectiveness resulting from trial counsel's failure to present witness testimony at trial requires adherence to the following test.

> A defense counsel's failure to call a particular witness to testify does not constitute ineffectiveness *per se.* ***Commonwealth v. Cox****,* 603 Pa. 223, 267, 983 A.2d 666, 693 (2009) (citation omitted). "In establishing whether defense counsel was ineffective for failing to call witnesses, a defendant must prove

> the witnesses existed, the witnesses were ready and willing to testify, and the absence of the witnesses' testimony prejudiced petitioner and denied him a fair trial." ***Id.*** at 268, 983 A.2d at 693.

Commonwealth v. Johnson, 27 A.3d 244, 247 (Pa. Super. 2011). "Further, ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense." ***Commonwealth v. McLaurin***, 45 A.3d 1131, 1137 (Pa. Super. 2012), *appeal denied*, 65 A.3d 413 (Pa. 2013), *quoting* ***Commonwealth v. Khalil***, 806 A.2d 415, 422 (Pa. Super. 2002), *appeal denied*, 818 A.2d 503 (Pa. 2003).

Instantly, Appellant argues trial counsel was ineffective for failing to call Shannon Tutler as a witness. Appellant's Brief at 21. However, aside from noting that her testimony would have been "invaluable", Appellant fails to attach any affidavit of her availability and willingness to testify, or to present an argument as to what evidence she would have testified about. Accordingly, Appellant's claim must fail.

Additionally, Appellant's alternative claim that "due to lack of pretrial preparation, trial counsel did not adequately familiarize himself with the case, and therefore did not object to the testimony of C.I. Whyland [sic] [,]" must also fail. ***Id.*** at 22. Appellant argues that had counsel objected to alleged misstatements made by C.I. Wyland, "it not only would have discredited [his] testimony, it also would have exposed and established

motive that supported the claims of the defense." ***Id.*** at 23. Specifically, he argues that C.I. Wyland was "attempting to implicate someone ([A]ppellant) of a crime he wasn't guilty of." ***Id.*** Appellant concludes that trial counsel had no reasonable strategic basis for this decision.

Our Supreme Court has recognized that the "[f]ailure to prove any prong of th[e ***Pierce***] test will defeat an ineffectiveness claim." ***Commonwealth v. Philistin***, 53 A.3d 1, 10 (Pa. 2012) (citation omitted). "With regard to the second, reasonable basis prong, 'we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis.'" ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1127 (Pa. 2011) (citation omitted). "[W]e only inquire whether counsel had any reasonable basis for his actions, not if counsel pursued the best available option." ***Philistin***, ***supra.***

As Appellant notes, defense counsel specifically called C.I. Wyland's testimony into question for the jury. In his closing argument, defense counsel argued as follows.

> [Defense Counsel]: … Now, when we spoke about the credibility of witnesses there [are] certain factors that get taken into consideration, their ability to tell the truth, in essence, and you take into consideration whether there is any motive, bias, or reasons for them to make statements other than the truth. Now, this case - - the sole part of this case rests on the credibility of [the C.I.]. Each and every alleged buy here, controlled buy, buy on September 18th, the dealing of money on September 22nd. Each

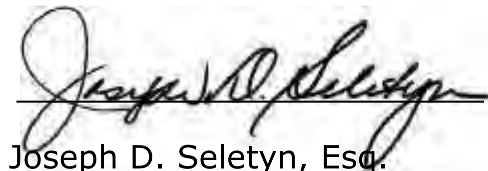
> and every single one had no other visible witnesses outside of [the C.I.].

N.T., 4/28/10, at 3. Further, the only alleged error Appellant cites is defense counsel's failure to object to C.I. Wyland's answer to a question by the prosecutor on redirect asking him if Appellant had ever asked if he worked for the police, to which he answered "No." Appellant's Brief at 22. Defense counsel cannot object to the credibility of a witness's answer, and a review of C.I. Wyland's testimony as a whole reveals defense counsel vigorously pursued the defense theory that C.I. Wyland had personal motives for implicating Appellant. N.T., 4/27/10, 89-97. Accordingly, Appellant cannot meet the reasonable basis prong of the ***Pierce*** test, and his issue must fail.

Based on the foregoing, we conclude that the PCRA court properly dismissed Appellant's petition. Accordingly, the PCRA court's May 14, 2013 order is affirmed.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/2/2014