

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

TROY CARSTON

Appellant

No. 1114 EDA 2013

Appeal from the PCRA Order March 15, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0106181-2006

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.:

FILED JUNE 27, 2014

Appellant, Troy Carston, appeals from the order entered in the Philadelphia County Court of Common Pleas, dismissing his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm.

In its opinion, the PCRA court fully and correctly set forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

Appellant raises one issue for our review:

DID THE [PCRA] COURT ERR WHEN IT DISMISSED
[APPELLANT'S PCRA] PETITION WHEREIN THE ISSUE
RAISED WAS THAT HE WAS DENIED INEFFECTIVE
ASSISTANCE OF COUNSEL AS TRIAL AND APPELLATE

¹ 42 Pa.C.S.A. §§ 9541-9546.

*Former Justice specially assigned to the Superior Court.

COUNSEL FAILED TO PROPERLY RAISE AND PRESERVE HIS
SUPPRESSION CLAIMS?

(Appellant's Brief at 2).

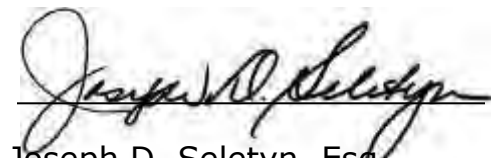
Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). We give no such deference, however, to the court's legal conclusions. ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa.Super. 2012). Further, a petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact, the petitioner is not entitled to PCRA relief, and no purpose would be served by any further proceedings. ***Commonwealth v. Wah***, 42 A.3d 335, 338 (Pa.Super. 2012).

After a thorough review of the record, Appellant's brief, the applicable law, and the well-reasoned opinion of the Honorable Benjamin Lerner, we conclude Appellant's issue merits no relief. The PCRA court's opinion comprehensively discusses and properly disposes of the question presented. (**See** PCRA Court Opinion, filed August 9, 2013, at 4-8) (finding: trial

counsel did not file omnibus pretrial motion; instead, trial counsel raised suppression issues orally, including challenge to validity of warrant to search Appellant's home; court denied oral suppression motion, and Superior Court did not review suppression ruling due to Appellant's failure to file formal, omnibus, pretrial motion; nevertheless, Appellant's suppression claims lacked arguable merit; off-duty police officer witnessed Appellant argue with girlfriend and chase her into neighbor's residence, followed by sound of gunfire coming from inside residence; Appellant fled scene, holding waistband as he ran; witnesses watched Appellant momentarily enter his own home; upon exiting, Appellant no longer clutched waistband; under totality of circumstances, facts stated in affidavit established probable cause to search Appellant's home for discarded firearm; moreover, Appellant did not suffer prejudice because jury did not convict him of weapons offenses; even if court had suppressed firearm recovered during search, outcome of proceedings would not have been different). Accordingly, we affirm on the basis of the PCRA court opinion.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/27/2014

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH

CP-51-CR-0106181-2006 Comm. v. Carston, Troy
Opinion

CP-51-CR-0106181-2006

VS.



SUPERIOR COURT
NO. 1114 EDA 2013

TROY CARSTON

OPINION

By: The Honorable Benjamin Lerner

Petitioner Troy Carston has filed an appeal of this court's order dismissing his petition pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. § 9541 et seq.

FILED

AUG 9 2013

Criminal Appeals Unit
First Judicial District of PA

PROCEDURAL HISTORY

On June 27, 2007, following a jury trial before the Honorable John J. Poserina, petitioner was convicted of burglary, criminal mischief and criminal trespass. On November 17, 2002, while awaiting sentencing, petitioner filed a post-verdict Motion for Extraordinary relief. Judge Poserina denied petitioner's motion and, on December 18, 2007, imposed a five (5) to ten (10) year state prison term on the burglary bill followed by five (5) years probation. No further penalty was imposed on the remaining bill.

Petitioner filed a timely direct appeal in the Superior Court. On April 23, 2009, the Superior Court affirmed petitioner's judgment of sentence, Commonwealth v. Carston, No. 358 EDA 2008. On October 15, 2009, the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal. Commonwealth v. Carston, 982 A.2d 63 (Pa. 2009).

On or about December 23, 2009, petitioner filed a *pro se* PCRA petition, alleging trial and

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appellate counsel were ineffective¹. Sondra R. Rodrigues, Esq., was subsequently appointed to represent petitioner and filed an Amended PCRA petition on petitioner's behalf. The Commonwealth filed a Motion to Dismiss².

On March 15, 2013, after reviewing the record and considering the arguments of counsel, ~~this court dismissed the instant petition without a hearing³. This timely appeal followed.~~

FACTS

The Superior Court summarized the facts of the case as follows:

On September 23, 2005, off-duty Police Officer Antonina Anderson was sitting outside her parents' house at 1205 Melville Street in Philadelphia when she saw Carston arguing with his girlfriend across the street. She saw the girlfriend run toward 1225 South 46th Street and climb into the home through a window. Officer Anderson called 911 and reported a "burglary in progress." She then saw Carston run after his girlfriend and heard a gunshot coming from the area of 1225 South 46th Street. Officer Anderson went inside her parents' house and made a second call to 911, reporting "shots fired." She came back outside and noticed that Carston was

¹ Petitioner's case was administratively re-assigned to this court following Judge Poserina's retirement.

² Petitioner's case was continued on numerous occasions between May 2011 and December 2011 to allow PCRA counsel time to file an amended petition. It then took the Commonwealth several months to file its response. On July 16, 2012, this court determined that PCRA counsel's amended petition was deficient. The court directed PCRA counsel to file a supplemental amended PCRA petition. PCRA counsel failed to file any such pleading prior to the dismissal of the instant PCRA petition.

³ The dismissal occurred no less than twenty (20) days after petitioner was served with notice of the forthcoming dismissal of his PCRA petition. See Pa.R.Crim.P. 907(a).

clutching his shirt closed and holding his right hand on his waistband as he ran. Officer Anderson called Carston's description into police radio, reporting that he might be armed.

Several Philadelphia police officers arrived at the scene. Anonymous witnesses reported to one of the officers that they had seen Carston enter 4607 Woodland Avenue (Carston's residence) and exit quickly. The officers then saw Carston and pursued him on foot as he ran down an alley, scaled a wall to the roof of the residence, and ran across the rooftops of homes. With guns drawn, the officers several times ordered Carston to stop and raise his hands; he ignored their requests and kept running. Carston ran into the backyard of 1224 South 46th Street, the residence of William Jordan, who was home with his family. Shortly thereafter, Jordan saw Carston standing outside his dining room window. Jordan pointed a gun at Carston and said: "Don't jump through my window." When Carston ignored this warning and jumped through the window, shattering the glass as he dove inside, Jordan shot him, as did one of the officers who had been pursuing him. Carston sustained three gunshot wounds. He was apprehended inside the Jordan residence. Police later obtained and executed a search warrant for Carston's residence, where they recovered a gun and ammunition. (Superior Court Opinion (filed April 23, 2009), pp. 1-2).

ISSUE(S)

Petitioner makes the following claims:

1. Trial and appellate counsel were ineffective for failing to properly raise and preserve petitioner's suppression claims; and
2. Trial and appellate counsel were ineffective for failing to properly raise and preserve all but one of petitioner's jury instruction claims.

See Petitioner's Statement of Matters Complained of on Appeal.

DISCUSSION

The law in Pennsylvania presumes that counsel was effective. Commonwealth v. Cross, 535 Pa. 38, 634 A.2d 173 (1993). When evaluating claims of ineffective assistance of counsel, the first issue to be determined is whether the issue underlying the claim has arguable merit. Commonwealth v. Johnson, 527 Pa. 118, 122, 588 A.2d 1303, 1305 (1991). If the claim has merit, it must be determined whether counsel's course of action or inaction had a reasonable basis to further the defendant's interests. Commonwealth v. Copenhefer, 526 Pa. 555, 587 A.2d 1353 (1991). If no reasonable basis for counsel's course of action exists, appellant will be granted relief only if he or she demonstrates that counsel's improper course of conduct prejudiced him or her. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Commonwealth v. Pierce, 515 Pa. 153, 159, 527 A.2d 973, 975 (1987). Prejudice in this context has been defined to mean that an appellant must establish that, but for the arguably ineffective act or omission of counsel, there is a reasonable probability that the outcome of the proceeding would have been different. Commonwealth v. Jones, 546 Pa. 161, 683 A.2d 1181 (1996); Commonwealth v. Douglas, 537 Pa. 588, 645 A.2d 226 (1994). Appellant bears the burden of proving all three prongs of this standard. Commonwealth v. Baker, 531 Pa. 541, 614 A.2d 663 (1992).

In the instant case, petitioner was represented at trial and on direct appeal by Sandjai Weaver, Esq. Ms. Weaver did not file an omnibus pre-trial motion. Nor did she file a formal, written Motion to Suppress on petitioner's behalf. Instead, she raised the issue of suppression orally prior to trial and challenged the validity of a search warrant on the ground that it lacked

specificity. Judge Poserina denied the motion, and petitioner's case proceeded to trial.

On direct appeal, petitioner claimed that the trial court erred in denying his Motion to Suppress. He also claimed that the trial court erred in charging the jury. With regard to petitioner's suppression claim, the Superior Court did not review it on the merits. The Court ruled petitioner's suppression claim had been waived because he failed to comply with formal filing procedures⁴. (Superior Court Opinion, p. 4.) The Court also noted that petitioner raised a different suppression argument on appeal than the one he had raised before the trial court, and that he failed to raise his new suppression claims in a post-verdict motion. As for petitioner's claim regarding the court's jury instructions, the Superior Court found that those claims had also been waived because counsel either failed to make timely objections at trial⁵ or discuss them in a post-verdict motion. (Id., pp. 4-6)

Petitioner now claims that trial and post-trial counsel were ineffective for failing to properly raise and preserve his suppression issues for appellate review. This claim is without arguable merit because the search warrant for 4607 Woodland Avenue, the location from which the gun was seized, was supported by probable cause.

⁴ Pursuant to the Pennsylvania Rules of Criminal Procedure, "all pretrial requests for relief shall be included in one omnibus motion." Pa.R.Crim.P. 578.

Omnibus motions are required to be "filed and served within 30 days after arraignment..." Pa.R.Crim.P. 579.

Moreover, with regard to Motions to Suppress, Pa.R.Crim.P. 581 dictates that "if timely motion is not made hereunder, the issue of suppression of such evidence shall be deemed waived."

⁵ To preserve a challenge to a jury instruction, the defendant must make a specific objection to the instruction before the jury retires to deliberate. See Pa.R.Crim. 647(B).

“The starting point in determining whether a search and seizure conducted pursuant to a search warrant was unreasonable is to question whether probable cause existed to issue the search warrant.” Commonwealth v. Clark, 412 Pa.Super. 92, 95, 602 A.2d 1323, 1325 (1992). A magistrate may not consider any evidence outside the four corners of the affidavit. Commonwealth v. Singleton, 412 Pa.Super. 550, 553, 603 A.2d 1072, 1073 (1992). Probable cause exists when the information presented, reviewed in a practical, non-technical manner, supports a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Commonwealth v. Torres, 764 A.2d 532, 538 (Pa.2001). The standard of review in addressing a challenge to a trial court’s denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Commonwealth v. LaMonte, 859 A.2d 495, 499 (Pa.Super.2004).

The search warrant in petitioner’s case included the following affidavit of probable cause:

On 9/23/05, at approx. 7:00pm, P/O Anderson #2479, in off duty status, while standing in the 1200 block of Melville St, observed a B/F, run into the rear of 1225 S. 45th St. and frantically call to the residence for someone to open the rear door. After no response from inside, the B/F, ripped the screen from the rear window, threw open the window and dove in. Seconds later a B/M appeared at the rear of the property, following the B/F and was arguing w/ the B/F who was inside. The B/M stated he was going to send the B/F to jail for a carjacking she set up. The B/F, in the midst of the argument started yelling urging the B/M to “Run, Run”. At that time, P/O Anderson heard a gunshot from the residence, and the B/M fled the rear porch area, jumped the rear fence and fled south on Melville St. As the B/M was fleeing he held his arm clutched to his side like he was holding something. Concerned citizens approached P/O Campbell and advised him that the B/M, is known as Troy Carston, and that he entered 4607 Woodland Ave. for seconds and exited. Then the Police saw him and became involved in a foot pursuit, which ended when he was shot by a Resident at 1224 S. 46th St., after the male broke through his window. P/O Clayton #2426, who was in pursuit of the B/M, fired at the male, believing that his safety was at risk. The Scene is secured by Police Officers, in order to remove any intrusion a

night time search is requested. In order to recover evidence related to this incident and further this investigation, the Affiant believes Probable Cause exists to support this Warrant at 4607 Woodland Avenue.

Here, concerned citizens, who knew petitioner by name, told police that they saw petitioner enter 4607 Woodland Avenue for a few seconds. Moments before he had entered that location, police heard a gunshot and saw petitioner running with his hand clutching his side, as if he was holding a weapon. Petitioner was no longer clutching his side when he exited the location. Under the totality of the circumstances, the facts stated in the affidavit established probable cause to believe that petitioner had been in possession of a firearm, and that he had discarded the firearm inside 4607 Woodland Avenue.

In regard to the nighttime search provision of the warrant, this provision was entirely reasonable in light of the fact that petitioner was arrested at approximately 7:00 p.m. and the scene was secured by police officers. It would have been absurd to require the police officers to continue to secure the scene until morning or to prevent the other occupants of the residence from sleeping in their beds that night. Further, since petitioner was in custody, his privacy was not violated by a nighttime search.

Because there was probable cause to support the search warrant and ample reason for a nighttime search, petitioner's claim that prior counsel were ineffective for failing to obtain appellate review of the denial of his suppression motion on the merits must fail. The suppression court's ruling is supported by the record. The result in the Superior Court would have been no different had it decided the issue on the merits. Thus, petitioner has failed to show he was prejudiced by counsel's failure to properly preserve his suppression claims for appellate review.

Petitioner further fails to establish prejudice because he was not convicted of any weapons

offenses. Petitioner was found guilty of breaking into and causing damage to William Jordan's residence located at 1224 South 46th Street. There was no allegation at trial that petitioner used or was in possession of a firearm in the commission of that offense. The Commonwealth did suggest at trial that petitioner had a gun in his possession before the burglary, and that he left the gun in his residence before he jumped through Mr. Jordan's window. However, in light of all the evidence against petitioner on the burglary charge, it cannot be seriously argued that barring reference to the gun at trial would have led to a different verdict. Petitioner simply cannot show that the outcome of the trial would have been different even had the Superior Court reviewed and reversed the trial court's denial of his suppression motion on the merits.

Petitioner additionally claims that trial counsel was ineffective for "failing to properly raise and preserve all but one of Mr. Carston's jury instruction issues." (Appellant's 1925(b) Statement, #1(b)). He fails to specify which jury instructions he believes trial counsel should have objected to, the grounds upon which counsel should have objected, or how he was prejudiced by the instruction issue. This court is left to guess the basis for the claim. Accordingly, since petitioner has failed to adequately develop this claim, it should be deemed waived for purposes of appeal. See, Commonwealth v. Reeves, 907 A.2d 1 (Pa.Super.2006).

Even if this claim had been waived, this court's review of the jury instructions given in this case revealed no errors. A trial court has broad discretion in formulating jury instructions, so long as the law is presented to the jury in a clear, adequate, and accurate manner. Commonwealth v. Garcia, 847 A.2d 67, 73 (Pa.Super.2004). The record shows that the trial court's instructions on burglary, intent to commit escape, and consciousness of guilt were supported by the evidence at trial and comported with the Pennsylvania Suggested Standard Jury Instructions as well as the applicable

statutory language.

For all of the foregoing reasons, it is the opinion of this court that the dismissal of petitioner's amended PCRA petition should be affirmed.

BY THE COURT:

Benjamin Jiner

DATE:

August 8, 2013