

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

GARY B.

Appellant

No. 1187 MDA 2013

Appeal from the Order Entered on June 3, 2013  
In the Court of Common Pleas of Luzerne County  
Criminal Division at No.: CP-40-CR-0001521-2007

BEFORE: PANELLA, J., WECHT, J., and STRASSBURGER, J.\*

MEMORANDUM BY WECHT, J.:

**FILED JUNE 18, 2014**

Gary B. appeals from the June 3, 2013 order dismissing his petition for relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541, *et seq.* We affirm.

On May 4, 2006, Gary B.'s adopted daughter, H.B., reported to the Pennsylvania State Police that Gary B. had sexually abused both her and her sister, J.B., over a period of several years. At the time of these alleged incidents, Gary B. served as a foster parent for Luzerne County and shared a residence with his wife and five children.<sup>1</sup> H.B. stated that, on numerous occasions while she was between the ages of twelve and fourteen, Gary B.

---

\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> Four of those children, including both J.B. and H.B., were adopted children.

fondled her breasts and her vagina. These incidents occurred in the living room of the family's residence and in the bedroom that H.B. shared with her two sisters. Notes of Testimony ("N.T."), 11/10/2008, at 183. Gary B. also engaged in oral sex with H.B. in the living room of the residence.

Similar acts also took place outside of Gary B.'s home. On multiple occasions while H.B. was between the ages of fifteen and seventeen, Gary B. took H.B. on fishing trips to a private pond in Columbia County, Pennsylvania. There H.B. would consume alcoholic beverages that Gary B. had purchased for her. On these trips, Gary B. touched H.B.'s breasts and vagina.

In April 2006, Gary B. traveled to Monroe County with H.B. and J.B. There, the three stayed at Gary B.'s biological daughter's home while she attended a wedding in New Jersey. H.B. and J.B. consumed alcoholic beverages that Gary B. had purchased for the girls earlier that day. Gary B. instructed H.B. and J.B. to undress, at which point he proceeded to touch their genitals and their breasts.

On May 4, 2006, H.B. disclosed these instances of abuse to the mother of a fellow classmate, Angelique Stone ("Stone"). On that same day, Stone transported H.B. to the state police barracks in Luzerne County. On May 5, 2006, Pennsylvania State Police trooper Christopher King questioned Gary B. about these allegations. During the interview, Trooper King stated that he knew that Gary B. had "touched his daughters." N.T. at 349. Gary B. nodded in the affirmative and, in a low tone, responded "yeah." ***Id.***

On March 27, 2007, Trooper King filed a criminal complaint, charging Gary B. with four counts of involuntary deviate sexual intercourse, four counts of aggravated indecent assault, two counts of endangering the welfare of children, four counts of corruption of the morals of a minor, two counts of furnishing alcohol to minors, five counts of indecent assault, one count of incest, one count of rape, and two counts of sexual assault.<sup>2</sup>

On November 17, 2008, a jury acquitted Gary B. on the charges of rape, incest, and on one of the sexual assault counts. The jury found Gary B. guilty on all other counts. On March 30, 2009, the trial court sentenced Gary B. to an aggregate term of eighteen to thirty-six years' imprisonment. The trial court also found Gary B. to be a sexually violent predator pursuant to 42 Pa.C.S. §§ 9798 (effective 1/24/2005–2/20/2012).

On April 9, 2009, Gary B. filed a timely post-sentence motion to modify his sentence. The trial court denied that motion on May 4, 2009. On September 27, 2011, on direct appeal, this Court affirmed Gary B.'s judgment of sentence. ***Commonwealth v. [Gary B.]***, 942 MDA 2009, slip op. at 8 (Pa. Super. Sept. 27, 2011) (*en banc*). On March 7, 2012, the Pennsylvania Supreme Court denied Gary B.'s petition for allowance of appeal. ***Commonwealth v. [Gary B.]***, 40 A.3d 119 (Pa. 2012) (*per curiam*).

---

<sup>2</sup> 18 Pa.C.S. §§ 3123, 3125, 4304, 6301, 6310.1, 3126, 4302, 3121, and 3124.1, respectively.

On July 12, 2012, Gary B. timely filed the instant PCRA petition. Therein, Gary B. alleged ineffective assistance of counsel ("IAC"). Specifically, Gary B. asserted that his trial attorneys, Joseph Yeager ("Attorney Yeager") and Vincent Cappellini ("Attorney Cappellini"), failed to call Gary B.'s close friend, Dawn Oliver ("Oliver"), as a witness at trial. According to Gary B., Oliver's testimony would have demonstrated that H.B. fabricated the allegations of sexual abuse against Gary B. Gary B. further contends that Oliver's proffered testimony would have demonstrated that members of the prosecution threatened Oliver in an effort to prevent her from testifying at Gary B.'s trial. On January 3, 2013, the PCRA court held an evidentiary hearing.

At the PCRA hearing, Gary B. testified that he had informed Attorneys Cappellini and Yeager that Oliver was a potential trial witness. Oliver similarly testified that she was willing to testify at Gary B.'s trial, but that neither Attorney Cappellini nor Attorney Yeager ever contacted her.<sup>3</sup> Oliver further alleged that Jennifer Roberts, an assistant district attorney for Luzerne County, intimidated her in order to prevent her from testifying at Gary B.'s trial. Specifically, Oliver indicated that, in 2005, Roberts

---

<sup>3</sup> Although Oliver claims that she "was supposed to be at the trial," she admits that she had no personal knowledge to suggest that Attorneys Yeager or Cappellini were ever informed that she was a possible witness. Notes of Testimony PCRA ("N.T.P."), 1/3/2013, at 81.

threatened that Oliver would “lose [her] children for good” if she testified for the defense. N.T.P. at 77. Contrary to Oliver’s narrative, Attorney Yeager testified at the evidentiary hearing that either he or Attorney Cappellini investigated all potential witnesses that Gary B. provided to them. Attorney Yeager also stated that Gary B. had never informed him that an assistant district attorney had threatened a potential defense witness.

On June 3, 2013, the PCRA court denied Gary B.’s PCRA petition. On June 28, 2013, Gary B. filed a notice of appeal. The PCRA court ordered Gary B. to file a concise statement of the errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Gary B. timely complied. The PCRA court filed an opinion pursuant to Pa.R.A.P. 1925(a) on October 9, 2013.

Gary B. submits one issue for our consideration:

Whether the [PCRA] court erred in denying [Gary B.’s] PCRA claim that trial counsel was ineffective for not calling Dawn Oliver as a witness at trial?

Brief for Gary B. at 4.

Our review of an order granting or denying PCRA relief is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). Where the record supports a post-conviction court’s credibility determination, we are bound by that determination. ***Commonwealth v. Knighten***, 742 A.2d 679, 682 (Pa. Super. 1999).

The attendant legal standards for claims of IAC are well-defined:

In Pennsylvania, counsel is presumed effective, and a defendant bears the burden of proving otherwise. In order to be entitled to relief on a claim of ineffective assistance of counsel, the PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel's action or inaction. When determining whether counsel's actions or omissions were reasonable, we do not question whether there were other more logical course of actions which counsel could have pursued: rather, we must examine whether counsel's decisions had any reasonable basis. Further, to establish prejudice, a petitioner must demonstrate that but for the act or omission in question, the outcome of the proceedings would have been different. Where it is clear that a petitioner has failed to meet any of the three, distinct prongs . . . , the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met.

***Commonwealth v. Steele***, 961 A.2d 786, 796-97 (Pa. 2008) (citations and internal quotation marks omitted); ***see Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987). "In accord with these well-established criteria for review, a petitioner must set forth and individually discuss substantively each prong of the ***Pierce*** test." ***Steele***, 961 A.2d at 797 (citations omitted).

Additionally, to establish that counsel was ineffective for failing to interview or present a witness, Gary B. must demonstrate: (1) the existence and availability of the witness; (2) that trial counsel was aware of, or had a duty to know of the witness; (3) that the witness was willing and able to cooperate and appear on the defendant's behalf; and (4) that the proposed testimony of the uncalled witness would have been helpful to the defense

asserted at trial. ***Commonwealth v. O'Bidos***, 849 A.2d 243, 249 (Pa. Super. 2004) (citation omitted).

Instantly, Gary B. bases his claim upon trial counsel's failure to investigate and present Oliver as a witness. Brief for Gary B. at 8. Although Gary B. recites the appropriate legal test for claims of IAC, he fails to explain, in any meaningful detail, how he has suffered prejudice due to counsel's actions or inactions. The gist of Gary B.'s argument, with regard to prejudice, is encapsulated by a single conclusory sentence, wherein Gary B. claims that Oliver's proffered testimony would have weakened H.B.'s credibility. Brief for Gary B. at 13. Such bald assertions cannot satisfy a petitioner's burden to demonstrate that counsel was ineffective. ***See Commonwealth v. Chmiel***, 30 A.3d 1111, 1128 (Pa. 2011).

Moreover, the certified record in this case reveals that, even if Gary B. had satisfied the well-established IAC pleading requirements, his claim still must fail. Oliver stated that Roberts had made specific threats to her in 2005, but the instant investigation did not commence until May 4, 2006. N.T. at 344. Therefore, Oliver's allegations of prosecutorial intimidation are dubious in that they do not comport with the procedural history of this case.

At no point in his argument does Gary B. acknowledge the fact that the PCRA court, in its October 9, 2013 opinion, unambiguously concluded that Oliver's testimony was incredible and found the testimony of Gary B.'s trial counsel to be credible in all respects. PCRA Court Opinion, 10/9/13, at 7. Where the record supports a post-conviction court's credibility

determinations, as is the case here, we are bound by them. ***Knighen, supra***. In light of the PCRA court's credibility determinations, Gary B.'s contention that he has suffered prejudice due to his counsel's actions or inactions is without merit.<sup>4</sup> Thus, even assuming, *arguendo*, that Gary B. has established the first two IAC prongs, his claim still fails. ***See id.***

Accordingly, the court did not err or abuse its discretion in dismissing Gary B.'s PCRA petition.

Order affirmed.

---

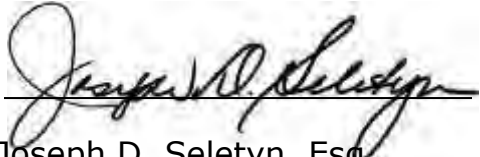
<sup>4</sup> In concluding that he has adequately demonstrated prejudice, Gary B. relies upon ***Commonwealth v. Weiss***, 606 A.2d 439 (Pa. 1992). Gary B. argues that, as in ***Weiss***, the credibility of the alleged victim was of paramount importance. Gary B.'s reliance upon ***Weiss*** is misplaced. In that case, counsel was unable to state with certainty that he had contacted all of the potential character witnesses whose names the appellant had provided to him. ***Id.*** at 442-43. Furthermore, counsel failed to present *any* character evidence due to his belief that "the jury just thinks it's garbage." ***Id.*** at 443.

Unlike in ***Weiss***, Gary B. presented multiple witnesses at trial who testified that H.B. was generally a dishonest person and that H.B.'s allegations against Gary B. were false. N.T. at 510, 514, 525. Moreover, the proposed character witnesses in ***Weiss*** were not determined to be incredible by the PCRA court. Hence, ***Weiss*** is distinguishable, and does not control this case.



J-S29028-14

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: 6/18/2014