

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
RASHAN D. COLEY,	:	
	:	
Appellant	:	No. 1332 MDA 2013

Appeal from the PCRA Order entered on June 18, 2013
in the Court of Common Pleas of Lackawanna County,
Criminal Division, No. CP-35-CR-0001318-2009

BEFORE: PANELLA, OLSON and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED APRIL 30, 2014

Rashan D. Coley ("Coley") appeals, *pro se*, from the Order dismissing his Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

This Court previously set forth the history underlying this appeal as follows:

On December 15, 2009, following a jury trial, [Coley] was found guilty of possession with intent to deliver heroin ["PWID"]. The charge arose on June 2, 2008, when Pennsylvania State Trooper T.J. Horan ["Trooper Horan"] stopped a vehicle [hereinafter referred to as "the vehicle"] in which [Coley] was a passenger[. A]fter securing a search warrant for the

vehicle, [Trooper Horan] discovered 4,529 bags of heroin.^[1]

On March 31, 2010, [Coley] was sentenced to seven to fourteen years[of] incarceration. No post-sentence motions were filed. [Coley's] counsel [hereinafter referred to as "trial counsel"] filed a [N]otice of [A]ppeal on May 3, 2010. A panel of this Court subsequently quashed the appeal as untimely filed. **Commonwealth v. Coley**, No. 765 MDA 2010 (Judgment Order) (Pa. Super. filed December 7, 2010).

On February 3, 2011, [Coley] filed a *pro se* PCRA [P]etition alleging ineffective assistance of [trial] counsel for failing to file a timely direct appeal and requesting reinstatement of his appeal rights *nunc pro tunc*. On February 17, 2011, the PCRA court reinstated [Coley's] direct appeal rights [*nunc pro tunc*].

Commonwealth v. Coley, 589 MDA 2011 (Pa. Super. filed December 16, 2011) (unpublished memorandum at 1-2) (footnote added). On appeal, this Court affirmed Coley's judgment of sentence, after which the Supreme Court of Pennsylvania denied allowance of appeal. **See id.**, *appeal denied*, 47 A.3d 844 (Pa. 2012).

¹ Relevant to the instant appeal, neither Coley nor the operator of the vehicle, Ghana Harper, consented to the search of the vehicle, and both men stated to Trooper Horan that a third party owned the vehicle. Prior to the search of the vehicle, Trooper Horan radioed a police dispatcher and requested that a police officer with a K-9 police dog be sent to the scene to perform a canine sniff of the vehicle. Officer Kevin Forese ("Officer Forese") and his K-9 police dog, Bruin (hereinafter "K-9 Bruin"), responded to the scene, and K-9 Bruin alerted on several places on the exterior of the vehicle to the presence of narcotics. Officer Forese testified at Coley's trial and described his training and certification as a K-9 handler, and stated that K-9 Bruin was certified as a police K-9 dog after K-9 Bruin and Officer Forese had completed extensive training at a Police K-9 Academy. Finally, Trooper Horan's police cruiser was equipped with mobile video/audio recording ("MVR") equipment (hereinafter referred to as "the MVR dashboard camera"). According to Trooper Horan, upon his return to the State Police barracks following the traffic stop of the vehicle, he determined that the MVR dashboard camera was not operational and did not record the traffic stop.

On June 29, 2012, Coley timely filed a *pro se* PCRA Petition. Following the filing of the PCRA Petition, the PCRA court appointed Kurt Lynott, Esquire (“Attorney Lynott”), to represent Coley. After review, Attorney Lynott filed a **Turner/Finley**² “no-merit” letter, opining that all of the issues raised in Coley’s *pro se* PCRA Petition lacked merit.³ Attorney Lynott also filed a Petition to Withdraw as Coley’s counsel. The PCRA court subsequently granted Attorney Lynott permission to withdraw as counsel.

On April 30, 2013, the PCRA court gave Coley Notice of its intent to dismiss his PCRA Petition without a hearing, pursuant to Pennsylvania Rule of Criminal Procedure 907. Coley filed a *pro se* response to the PCRA court’s Notice (hereinafter referred to as the “Rule 907 Response”). After reviewing Coley’s Rule 907 Response and determining that the claims raised therein did not entitle Coley to relief, the PCRA court entered an Order on June 18, 2013, dismissing Coley’s PCRA Petition. Coley timely filed a *pro se* Notice of Appeal.

On appeal, Coley presents the following issues for our review:

- I. Whether the [C]ommonwealth failed to prove beyond a reasonable doubt that [Coley] had actual or constructive possession of a controlled substance?

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

³ Attorney Lynott did not file an amended PCRA petition on Coley’s behalf. Additionally, Coley filed a response challenging Attorney Lynott’s no-merit letter and his determination that Coley’s issues lacked merit.

- II. Whether there was ineffective assistance of [Coley's trial] counsel for failure to investigate, research, obtain, and present [] valuable information?

Brief for Appellant at 4.

Coley first argues that his conviction of PWID cannot stand because the Commonwealth failed to prove beyond a reasonable doubt that he was in actual or constructive possession of the narcotics seized from the vehicle. ***Id.*** at 8-9.

Coley's claim challenges the sufficiency of the evidence supporting his conviction. However, such a claim is not cognizable in a PCRA petition, as it must be raised on direct appeal. ***See Commonwealth v. Price***, 876 A.2d 988, 994 (Pa. Super. 2005). Moreover, Coley's sufficiency challenge is distinct from a collateral claim that his trial counsel was ineffective for failing to present a challenge to the sufficiency of the evidence on direct appeal, and Coley does not raise such an ineffectiveness claim on appeal. ***See id.*** (stating that challenges to the sufficiency of the evidence, without any ineffectiveness of counsel analysis, are not cognizable under the PCRA). Accordingly, we cannot review Coley's claim.

Coley next argues that the PCRA court erred by dismissing his PCRA Petition because he pled and proved that his trial counsel was ineffective for "fail[ing] to investigate, obtain, and present valuable information at trial[.]" Brief for Appellant at 19.

The applicable standards of review regarding ineffectiveness claims and dismissal of a PCRA petition are as follows:

Our standard of review of a PCRA court's [dismissal] of a petition for post[-]conviction relief is well-settled: We must examine whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record.

* * *

It is well-established that counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's action or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error. The PCRA court may deny an ineffectiveness claim if the petitioner's evidence fails to meet a single one of these prongs. Moreover, a PCRA petitioner bears the burden of demonstrating counsel's ineffectiveness.

Commonwealth v. Franklin, 990 A.2d 795, 797 (Pa. Super. 2010) (citations omitted).

Coley first argues that trial counsel was ineffective for failing to interview or obtain a statement from the owner of the vehicle. Brief for Appellant at 19. Coley failed to raise this claim in either his PCRA Petition or his Rule 907 Response. Accordingly, this claim is waived. **See** Pa.R.A.P. 302(a) (stating that a claim cannot be raised for the first time on appeal).

Next Coley asserts that trial counsel was ineffective for failing to object at trial that neither Officer Forese nor his police dog, K-9 Bruin, had the

requisite certifications to conduct a valid canine sniff for narcotics. Brief for Appellant at 21. According to Coley, Officer Forese's testimony regarding the canine sniff of the vehicle was therefore inadmissible at trial and trial counsel should have objected to the admission of his testimony. **Id.** at 22. We disagree.

At trial, Officer Forese presented testimony regarding both his certification as a police K-9 handler, as well as K-9 Bruin's extensive training and certification as a police K-9 dog. N.T., 12/15/09, at 138-43. Furthermore, we discern no reason why Officer Forese's testimony would be inadmissible at trial. Accordingly, Coley's instant ineffectiveness challenge fails because (1) the underlying legal claim lacks arguable merit; and (2) trial counsel had no basis to object to the admission of Officer Forese's testimony. **See Franklin, supra** (stating that in order to prevail on an ineffectiveness claim, a PCRA petitioner must plead and prove that there is arguable merit to the underlying claim and that counsel's action or omission lacked any objectively reasonable basis designed to effectuate his or her client's interest).

Finally, Coley argues that trial counsel was ineffective because he failed to request that the trial court preclude Trooper Horan's testimony regarding the traffic stop of the vehicle on the basis that Trooper Horan's MVR dashboard camera was not operational and did not record the traffic stop. Brief for Appellant at 23-24. According to Coley, "[t]he lack of audio

& video evidence to transcribe the events as they took place[] left [Coley] at a significant disadvantage in his defense.” **Id.** at 23 (parentheses omitted); **see also id.** at 24 (alleging that “Trooper [Horan] inadvertently violated [Coley’s] rights to due process[] and a fair trial.” (capitalization omitted)).

Although the MVR dashboard camera did not record the traffic stop, Trooper Horan’s testimony regarding the stop was clearly admissible even without the admission of a contemporaneous audio/video recording of the stop. Accordingly, Coley’s ineffectiveness claim fails because trial counsel had no reasonable basis to object to the admission of Trooper Horan’s testimony regarding the traffic stop based upon the absence of an audio/video recording of the stop. **See Franklin, supra.**

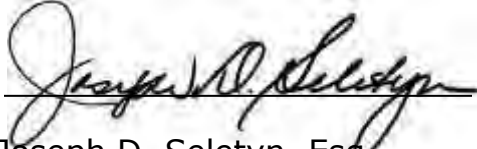
Moreover, after reviewing the claims presented in Coley’s Rule 907 Response, we conclude that the PCRA court properly determined that none of these claims entitles Coley to collateral relief.

Accordingly, because we conclude that the PCRA court neither abused its discretion nor committed an error of law by dismissing Coley’s PCRA Petition, we affirm the Order on appeal.

Order affirmed.

J-S19036-14

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: 4/30/2014