

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

Appellee

v.

JEREMY JAMES LONG,

Appellant

: No. 1351 MDA 2013

Appeal from the PCRA Order July 9, 2013,
Court of Common Pleas, Adams County,
Criminal Division at No. CP-01-CR-0000214-2012

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

Appellee

v.

JEREMY JAMES LONG,

Appellant

: No. 1814 MDA 2013

Appeal from the Order entered October 1, 2013,
Court of Common Pleas, Adams County,
Criminal Division at No. CP-01-CR-0000214-2012

BEFORE: BENDER, P.J.E., DONOHUE and STRASSBURGER*, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED MAY 21, 2014

In these consolidated appeals, Jeremy James Long (“Long”) appeals *pro se*¹ from the July 9, 2013 order of court dismissing his petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-

¹ Long petitioned for permission to proceed *pro se* on appeal and the trial court granted this request following a hearing pursuant to ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998). **See** Trial Court Order, 9/30/13.

*Retired Senior Judge assigned to the Superior Court.

9546, and the October 1, 2013 order of court denying his petition for re-parole.² For the following reasons, we affirm.

We begin with Long's appeal from the order dismissing his PCRA petition. The record in this appeal reveals a convoluted procedural history, but the relevant portions thereof may be summarized as follows. On October 1, 2012, Long pled *nolo contendere* to one count of delivery of a controlled substance, 35 P.S. § 780-113(a)(30). He was sentenced to time served to 23½ months of imprisonment. Long did not file post-sentence motions or a direct appeal.

On March 28, 2013, Long's parole was revoked based upon his admission that he had tested positive for Percocet and heroin, and because drug paraphernalia was found in his home. The trial court recommitted Long to prison to serve the balance of his sentence, which was in excess of 15 months. The trial court further provided that Long could again be re-paroled in six months. Trial Court Order, 3/28/13.

On April 2, 2013, Long filed a *pro se* PCRA petition, raising multiple claims of ineffective assistance of counsel and prosecutorial misconduct. Counsel was appointed, and the parties appeared before the court for a pre-hearing conference on Long's PCRA hearing. Following this conference, the PCRA court issued notice of its intention to dismiss the PCRA petition without

² Long was informed of this Court's *sua sponte* consolidation of his appeals by the order dated November 22, 2013. Following consolidation, Long sought and was granted an extension of time in which to file his appellate brief with this Court. **See** Superior Court Order, 12/6/13.

a hearing pursuant to Pa.R.Crim.P. 907. On July 9, 2013, the PCRA court denied Long's PCRA petition.³ This timely appeal followed.

On appeal, Long raises the following issues:

1. Were attorneys Kristen Rice and Warren Bladen ineffective?
2. Was attorney Roy Keefer ineffective?
3. Was attorney David Erhard ineffective?
4. Did the Commonwealth commit **Brady** [r]ule violations?
5. Did the [t]rial [c]ourt err in stating that there was no evidence to 'contradict the affidavit?'
6. Was attorney Thomas R. Nell ineffective?
7. Did the trial court err in denying me leave to amend the memorandum of law that was filed by Thomas R. Nell?

Appellant's Brief at 2.⁴ We begin with our standard of review:

Our review of a PCRA court's grant or denial of relief is limited to examining whether the court's determination is supported by the evidence and whether it is free of legal error. This Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. The findings of a post-conviction court will not be disturbed unless they have no support in the record.

³ Long filed a *pro se* response to the Rule 907 notice, which the trial court accepted despite the fact that Long was still represented by counsel. **See** Trial Court Order, 7/9/13.

⁴ In contravention of Pennsylvania Rule of Appellate Procedure 2173, Long did not number the pages in his appellate brief. We have assigned page numbers to his brief for ease of reference.

Commonwealth v. Hickman, 799 A.2d 136, 140 (Pa. Super. 2002)

(internal citations omitted). We are further mindful of the following:

To be entitled to PCRA relief, appellant must establish, by a preponderance of the evidence, that his conviction or sentence resulted from one or more of the enumerated errors in 42 Pa.C.S. § 9543(a)(2), his claims have not been previously litigated or waived, and the failure to litigate the issue prior to or during trial ... or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

Commonwealth v. Robinson, 82 A.3d 998, 1005 (Pa. 2013). Section 9543(a)(2), which enumerates the errors upon which a PCRA claim may be based, provides as follows:

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the

inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

(v) Deleted.

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

42 Pa.C.S.A. § 9543(a)(2). Of relevance in this appeal, we note that “after a defendant has entered a plea of guilty, the only cognizable issues in a post[-]conviction proceeding are the validity of the plea of guilty and the legality of the sentence. **Commonwealth v. Rounsley**, 717 A.2d 537, 538 (Pa. Super. 1998) (citation omitted). Thus, as a plea of *nolo contendere* is treated as a guilty plea in terms of its effect upon a given case, **Commonwealth v. V.G.**, 9 A.3d 222, 226 (Pa. Super. 2010), the only cognizable claims Long could raise in his PCRA petition relate to the validity of his plea or the legality of his sentence.

Long’s first three allegations of error allege ineffective assistance of counsel. The first claim sets forth multiple allegations of ineffectiveness against Attorney Rice and Attorney Bladen, who represented Long during the

preliminary stages of his case.⁵ Long raised only one allegation of ineffectiveness as to these attorneys before the PCRA court: that they were ineffective for advising him to waive his preliminary hearing. **See** Order of Court, 5/2/13, at ¶ 1; N.T., 5/2/13, at 3. Thus, all other allegations of ineffectiveness of these attorneys that Long now makes have been waived. **Commonwealth v. Jones**, 815 A.2d 598, 607 (Pa. 2002) (holding that issues not raised in the PCRA court are waived and cannot be raised for the first time on appeal).

Long argues that Attorney Rice and Attorney Bladen were ineffective in advising him to waive his preliminary hearing because if he had not waived the preliminary hearing, "it would have allowed a skilled lawyers [*sic*] examination and cross-examination of witnesses to expose fatal weaknesses in the States [*sic*] case against me that may have lead [*sic*] the magistrate refusal [*sic*] to bind the case over to the Court of Common Pleas." Appellant's Brief at 11. This claim does not implicate the validity of Long's plea or the legality of his sentence, so Long is barred from raising it in his PCRA petition. **Rounsley**, 717 A.2d at 538.

Long next alleges the ineffective assistance of Attorney Roy Keefer, who represented Long after the preliminary hearing through the filing of pre-trial motions. Again, Long raises numerous allegations of ineffectiveness by

⁵ For instance, Long alleges that they were ineffective for failing to explain certain provisions of the Pennsylvania Rules of Criminal Procedure to him; that they failed to explain what a *prima facie* case is; and that Attorney Rice had a conflict of interest and should not have represented Long. Appellant's Brief at 11-14.

Attorney Keefer, but presented only two before the PCRA court: that Attorney Keefer was ineffective for failing to communicate with him and for giving Long erroneous advice regarding potentially exculpatory evidence. N.T., 5/2/13, at 3. We therefore limit our review to these issues. **See Jones**, 815 A.2d at 607 (holding that issues are waived on appeal when not raised in the PCRA court).

With regard to his claim of a failure to communicate, Long sets forth the text of Pennsylvania Rule of Professional Conduct 1.4, entitled "Communication," but does not explain in how or in what specific manner he believes Attorney Keefer had inadequate communication with him. He states only, "This did prejudice me by keeping me unduly incarcerated due to Mr. Keefer's failure to adhere to the Pennsylvania Rules of [P]rofessional [C]onduct and have reasonable communication with me and proceed with the case in the manner that I wished to proceed." Appellant's Brief at 22. Long's complaint therefore seems to be that Attorney Keefer did not act in accordance with his wishes, not that Attorney Keefer failed to communicate with him. This claim does not implicate the validity of Long's plea or the legality of his sentence, and so he is not entitled to raise it in a PCRA petition.

The essence of Long's claim concerning potentially exculpatory evidence is that Attorney Keefer did not agree with Long's assessment that certain information (specifically, the probation file of a confidential informant and the personnel file of the detective primarily involved in the undercover

operation that resulted in Long's arrest) was discoverable and would yield evidence with which to impeach these witnesses. Appellant's Brief at 23-25. In connection with this claim, Long implies that he would have proceeded to trial if Attorney Keefer had sought this impeachment evidence. Appellant's Brief at 24, 26. Accordingly, to the extent that this claim may be construed as implicating the validity of Long's plea, it is cognizable. However, it affords Long no relief.

To prevail on an ineffectiveness claim, appellant must establish: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) [appellant] suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error. Failure to prove any prong of this test will defeat an ineffectiveness claim.

Commonwealth v. Fears, 86 A.3d 795, 804 (Pa. 2014) (citations omitted).

Furthermore, when alleging ineffectiveness in connection with the entry of a guilty plea, "[t]o prove prejudice, appellant must prove he would not have pled guilty and would have achieved a better outcome at trial." ***Id.*** at 807.

We need to look no further than the first prong of the ineffectiveness test, as it is clear that Long has failed to prove that there is merit to the underlying claim. Assuming, *arguendo*, that the files at issue were discoverable, Long has failed to establish that there was information in either of these files that would have been useful impeachment material for these potential witnesses against him. In fact, Long does not even allege what information he

believed these files contained that would have been helpful to his defense. **See** Appellant's Brief at 23-26. This claim cannot succeed.

Long next claims that his next counsel, Attorney David Erhard,⁶ was ineffective for failing "to properly investigate a video of the incident that the prosecution allegedly told him of and the workings of the Alters Evidence log [s]ystem." Appellant's Brief at 28.

It is possible to interpret Long's claim as one relating to the validity of his plea, as he states that "if I would have had this information ... I would have in fact proceeded to trial." **Id.** at 29. However, as Long has failed to establish that he or Attorney Erhard knew of this allegedly potentially exculpatory evidence prior to the entry of Long's plea, he has necessarily failed to establish that its absence affected the validity of his plea. Of importance, Long does not allege that he told Attorney Erhard about this allegedly potentially exculpatory evidence or that Attorney Erhard knew of its existence. Long states only that he was made aware of the potentially exculpatory evidence at some unspecified time "by a Maryland State Trooper from the Westminster Maryland area named Trooper Dill during a transportation for a [*sic*] Interstate Agreement on Detainers." **Id.** Thus, this claim also fails.⁷

⁶ Attorney Erhard was appointed after Attorney Keefer sought permission to withdraw at the hearing on Long's pre-trial motion. Long consented to Attorney Keefer's withdrawal and sought to represent himself with the help of an attorney appointed as stand-by counsel. N.T., 6/18/12, at 3-4.

⁷ As with his other claims of ineffectiveness, Long again inserts multiple allegations of ineffectiveness against Attorney Erhard that were not raised in

Long next argues that the Commonwealth committed a **Brady**⁸ violation by failing to disclose the existence of surveillance videos despite his request for the same. Appellant's Brief at 33. Long implicates the validity of his plea with this claim, as he contends that he "would have proceeded to trial" if the Commonwealth had turned over the video surveillance tapes. **Id.** at 38.

Addressing this issue, the PCRA court found that Long failed to establish that the Commonwealth ever possessed the video surveillance tapes he sought, and therefore failed to establish a **Brady** violation. PCRA Court Opinion, 9/11/13, at 14. We find no error in that determination. "To establish a **Brady** violation, a defendant must demonstrate that: (1) the evidence was suppressed by the Commonwealth, either willfully or inadvertently; (2) the evidence was favorable to the defendant; and (3) the evidence was material, in that its omission resulted in prejudice to the defendant." **Commonwealth v. Antidormi**, 84 A.3d 736, 747 (Pa. Super. 2014) (citation omitted). "The obligation to turn over exculpatory evidence is limited to that information in the possession of the same government agency bringing the prosecution." **Commonwealth v. Puksar**, 951 A.2d 267, 283 (Pa. 2008). Long does not allege, much less prove, that the

the PCRA court. **See** Appellant's Brief at 30-33. These claims are waived. **Jones**, 572 Pa. at 357, 815 A.2d at 607.

⁸ This refers to a claim brought under **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194 (1963), which challenges the Commonwealth's failure to produce material evidence.

Commonwealth possessed the video surveillance tapes he claims would have exonerated him, thereby failing to establish that the prosecuting agency suppressed the items in question.⁹ He is therefore due no relief on this claim.

Long presents his next issue as follows: “Did the [t]rial [c]ourt err in stating that there was no evidence ‘to contradict the affidavit?’” Appellant’s Brief at 38. From our review of the record, we cannot find any indication that Long raised this issue before the PCRA court. The failure to present this issue to the PCRA court precludes its presentation on appeal. **Jones**, 815 A.2d at 607. Our review of the record also reveals that this issue was not included in the Long’s *pro se* or counseled 1925(b) statement of matters complained of on appeal. For this reason as well, it has been waived. **Commonwealth v. Nobles**, 941 A.2d 50, 51-52 (Pa. Super. 2008); Pa.R.A.P. 1925(b)(4)(vii).

The penultimate issue alleges ineffective assistance by Attorney Thomas Nell, who was appointed to represent Long in connection with his PCRA petition.¹⁰ Long argues that Nell was ineffective for failing to raise the

⁹ Tellingly, Long discusses this issue only in terms of the Commonwealth’s failure to disclose “the **existence** of a surveillance video.” Appellant’s Brief at 33 (emphasis added).

¹⁰ Long raised this issue in his response to the PCRA court’s Rule 907 notice, and so he has properly preserved and raised this issue for our review. **See Commonwealth v. Rigg**, 84 A.3d 1080, 1085 (Pa. Super. 2014) (holding that a PCRA petitioner properly raises a claim alleging the ineffective assistance of PCRA counsel “by including that claim in his Rule 907 response or raising that issue while the PCRA court retains jurisdiction.”).

issues that Long has raised in this appeal. Appellant's Brief at 42. We have considered Long's issues. We found some of them waived because Long did not raise them before the PCRA court, either through counsel or when representing himself. Accordingly, Attorney Nell, as appellate counsel, could not be deemed ineffective for not raising claims on appeal that were never raised in the PCRA court. With regard to the remaining issues, we concluded that they lack merit. Accordingly, as to these claims, Long would not be able to establish the first prong of the ineffectiveness test. This issue fails as well.

Finally, Long argues that the PCRA court erred by not allowing him to amend a memorandum of law submitted by Attorney Nell in order to "properly plead and present the issue he didn't raise." Appellant's Brief at 44.¹¹ Long fails to appreciate that he was given the opportunity to raise the additional claims in his response to the Rule 907 notice. **See Rigg**, 84 A.3d at 1086 (holding that to preserve a claim, PCRA petitioner must raise it in either PCRA petition or response to Rule 907 intent to dismiss). Indeed, in its Rule 907 notice, the PCRA court addressed all of the issues Long raised in his (*pro se*) PCRA petition and explained its conclusions as to why they lacked merit. The Rule 907 notice further provided that Long had 20 days in which to respond to the notice, which Long did. Long was afforded an

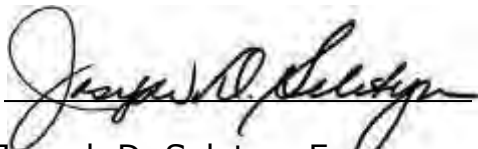
¹¹ Despite stating that he sought to amend a memorandum of law, Long cites Pennsylvania Rule of Criminal Procedure 905 and **Commonwealth v. Bennett**, 593 Pa. 382, 930 A.2d 1246 (2007), to support his position that amendment of **PCRA petitions** should be liberally granted. Appellant's Brief at 44-45.

opportunity to amend his claims, and he took it. Moreover, we note that Long does not identify any additional issues that he would have sought to include in another amendment.

We now turn our attention to Long's appeal from the October 1, 2013 order of court denying his petition for re-parole. Long did not include any issues regarding this appeal in his appellate brief. Accordingly, he has waived all issues related to that appeal and is not entitled to relief in connection therewith.¹² **See *Einhorn***, 911 A.2d at 969 n.2; Pa.R.A.P. 2116(a).

Orders 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: 5/21/2014

¹² We reiterate that Long was informed of the consolidation of his appeals by this Court's order of November 22, 2013, and that he was granted an extension of time in which to file with this Court a comprehensive appellate brief, addressing the issues he raised in both appeals. **See** Superior Court Order, 12/6/13.