

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

PEDRO DEJESUS

Appellant

No. 1457 MDA 2013

Appeal from the PCRA Order August 1, 2013  
In the Court of Common Pleas of Lancaster County  
Criminal Division at No(s): CP-36-CR-0002754-2010

BEFORE: PANELLA, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY PANELLA, J.:

**FILED MAY 29, 2014**

Appellant, Pedro Dejesus, appeals from the order entered August 1, 2013, by the Honorable Howard F. Knisely, Court of Common Pleas of Lancaster County, which denied Dejesus's petition filed pursuant to the Post Conviction Relief Act (PCRA). We affirm.

The trial court previously explained the background of this case on direct appeal as follows:

[Dejesus] was convicted of a sex offense in February 2005. Pursuant to Megan's Law, [Dejesus] was subject to lifetime registration as a sex offender. Prior to being released from prison, [Dejesus] provided the Pennsylvania State Police the address of 303 West King Street, Lancaster, Pennsylvania. Upon [Dejesus's] release from prison on March 19, 2010, Agent Mscisz, of the Pennsylvania Board of Probation and Parole (PBPP), learned that [Dejesus] was not residing at 303 West King Street. [Dejesus's] mother confirmed that [Dejesus] did not live at her address. She further informed the agent that [Dejesus] was living with his sister at 222 East Philadelphia Street, York Pennsylvania. Following further investigation,

[Dejesus] was arrested for failing to register in violation of Megan's Law.

Trial Court Opinion, 6/23/11 at 1-2 (footnotes omitted).

Following a jury trial on January 7, 2011, Dejesus was convicted of Failure to Comply with Registration of Sexually Offenders Requirements, 18 Pa.C.S. § 4915(3). On March 28, 2011, the trial court sentenced Dejesus to five to fifteen years' imprisonment. On appeal, this Court affirmed Dejesus's judgment of sentence and the Pennsylvania Supreme Court denied Dejesus's petition for allowance of appeal. **See Commonwealth v. Dejesus**, 48 A.3d 473 (Pa. Super., filed April 10, 2012), **appeal denied**, 616 Pa. 657, 50 A.3d 124 (2012).

Dejesus filed a *pro se* PCRA petition on November 8, 2012. The PCRA court thereafter appointed counsel and an amended PCRA petition was filed on March 14, 2013. Following a hearing held on June 17, 2013, the PCRA court denied Dejesus's petition. **See** PCRA Order, 8/1/13. This timely appeal followed.

Dejesus raises the following issue for our review:

Did trial counsel provide ineffective assistance of counsel to a degree that so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place by failing to subpoena state parole sign[-]in sheets, failing to subpoena a critical witness, and failing to extend a plea offer from the Commonwealth?

Appellant's Brief at 2.

We review the lower court's denial of a PCRA petition as follows. "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). In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3). "[T]his Court applies a *de novo* standard of review to the PCRA court's legal conclusions." **Commonwealth v. Spatz**, 18 A.3d 244, 259 (Pa. 2011) (citation omitted).

To determine whether the PCRA court erred in dismissing Dejesus's claims of ineffectiveness of counsel, we turn to the following principles of law:

In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, 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 ... Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of

counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

***Commonwealth v. Johnson***, 868 A.2d 1278, 1281 (Pa. Super. 2005).

Moreover, “[w]e presume counsel is effective and place upon Appellant the burden of proving otherwise.” ***Commonwealth v. Springer***, 961 A.2d 1262, 1267-1268 (Pa. Super. 2008). “This Court will grant relief only if Appellant satisfies each of the three prongs necessary to prove counsel ineffective.” ***Commonwealth v. Natividad***, 595 Pa. 188, 208, 938 A.2d 310, 322 (2007). Thus, we may deny any ineffectiveness claim if “the evidence fails to meet a single one of these prongs.” ***Id.***, 595 Pa. at 207-208, 938 A.2d at 321.

Preliminarily, we note that Dejesus’s claim that trial counsel was ineffective for failing to subpoena a witness is not included in his PCRA petition or the amended petition filed by counsel. Dejesus’s court-appointed counsel alleges that this issue was not included in the amended PCRA petition because he “was unaware of this issue until just days before the PCRA hearing.” Appellant’s Brief at 8. It is well settled that the “[f]ailure to state ... a ground [for relief] in the [PCRA] petition shall preclude the defendant from raising that ground in any proceeding for post-conviction collateral relief.” Pa.R.Crim.P. 902(B); ***see also Commonwealth v. Elliott***, 80 A.3d 415, 430 (Pa. 2013). Accordingly, we are constrained to find this issue is waived.

Even if we were to address this issue, however, we would not afford relief. Trial counsel will not be deemed ineffective for failing to call a witness to testify unless it is demonstrated that:

(1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial.

***Commonwealth v. Brown***, 18 A.3d 1147, 1160-1161 (Pa. Super. 2011) (citation omitted), ***appeal denied***, 611 Pa. 677, 29 A.3d 370 (2011). Instantly, Dejesus claims that his son was willing to testify on his behalf at trial. However, Dejesus altogether fails to assert that his son was *available* to testify at trial as required in order to find counsel ineffective for failing to call his son as a witness. Therefore, this claim would fail.

We proceed to address Dejesus's remaining claims of ineffective assistance of counsel. Dejesus argues that counsel was ineffective for failing to subpoena parole sign-in sheets. Dejesus claims that after his release from prison, his mother would not allow him to stay at her residence, so he was forced to stay with his sister. ***See*** Appellant's Brief at 3. Dejesus alleges that he unsuccessfully made numerous attempts to contact his state parole agent during the week of Monday, March 22, 2010 through Friday, March 26, 2010, the date of his eventual arrest. ***See id.*** He claims that the parole office sign-in sheets, if subpoenaed, would have proven to the jury his attempts to timely re-register with the parole office. ***See id.*** at 6. He

further maintains that although he went to the parole office every day, he didn't sign in every day. **See id.**

At the PCRA hearing, trial counsel testified that although he was aware that Dejesus felt that the sign-in sheets were important, he did not feel that they were material to the defense. **See** N.T., PCRA Hearing, 6/17/13 at 8, 10. Counsel testified he was specifically concerned that although Dejesus claimed to have been at the parole office daily, the fact that the records did not reflect that would raise "red flags" with the jury. **Id.** at 11. Counsel's testimony clearly establishes a reasonable strategic basis for withholding the sign-in records in order to protect Dejesus's credibility in front of the jury. We therefore discern no ineffective assistance of counsel.

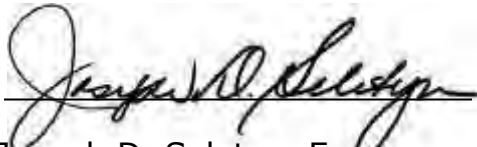
Lastly, Dejesus claims that trial counsel was ineffective for failing to relay the Commonwealth's plea offer. **See** Appellant's Brief at 9. At the PCRA hearing, trial counsel testified that he met with Dejesus in prison prior to trial and relayed the Commonwealth's plea offer of two to four years' imprisonment. **See** N.T., PCRA Hearing, 6/17/13 at 6. Counsel testified that Dejesus steadfastly rejected this offer. **See id.** at 6-7. The PCRA court specifically credited trial counsel's testimony, Trial Court Opinion, 8/1/13 at 3, and "we are bound by the PCRA court's credibility findings where those determinations are supported by the record." **Commonwealth v. Keaton**, 82 A.3d 419, 425 (Pa. 2013) (citation omitted). Dejesus's disagreement with the court's credibility determination is insufficient to set aside the

court's order. We therefore find no evidence to indicate that counsel was ineffective in relaying the Commonwealth's plea offer.

As we find no merit to Dejesus's claims of ineffective assistance of counsel, we affirm the order of the PCRA court.

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: 5/29/2014