NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. DALE PATRICK SLEDGE, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1473 WDA 2013

Appeal from the Order August 9, 2013
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0000272-2006

BEFORE: BOWES, J., JENKINS, J., and FITZGERALD, J.***

MEMORANDUM BY JENKINS, J. FILED: July 1, 2014

Dale Sledge, Jr. ("Sledge") appeals from the order dismissing his first petition filed under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. Sledge alleges ineffectiveness of pre-trial, trial, and appeal counsels. We affirm.

The PCRA court summarized the underlying factual background as follows:

> . . . . The crimes were committed in September 2005, when an anonymous confidential informant (hereinafter "CI"), known to the police, but whose name was not disclosed in this case, told Detective Sergeant Ronald Haggerty of the City of Connellsville Police Department and the Fayette County Drug Task Force that he/she was familiar with [Sledge's] residence located at 122 Gibson Terrace

*** Former Justice specially assigned to the Superior Court.

> Connellsville, Fayette County, Pennsylvania and that he/she had been present when [Sledge] sold crack cocaine from that residence. Based on the CI's information, a controlled buy between [Sledge] and the CI was set up and observed by undercover police officers. After the CI had proven his reliability, a second controlled buy was made, and then within forty-eight (48) hours of the second buy, Detective Haggerty applied for, and was granted, a search warrant for [Sledge's] residence based upon the information concerning the controlled buys. The execution of the warrant led to the discovery in [Sledge's] residence of the quantities of the controlled substances for which [Sledge] was charged and convicted.

PCRA Court Opinion, August 9, 2013 ("PCRA Court Opinion"), at 1-2.

On July 16, 2008, following Sledge's arrest, Attorney David Kaiser entered his appearance, waived Sledge's arraignment, and entered a plea of not guilty. On August 18, 2008, Attorney Kaiser filed an Omnibus Pretrial Motion, which included a motion to suppress, a motion to dismiss pursuant to Rule 600, and a motion for writ of habeas corpus. On October 17, 2008, the Honorable John J. Wagner, Jr. of the Fayette County Court of Common Pleas held a hearing on the Omnibus Pretrial Motion. On January 26, 2009, Judge Wagner denied all of Sledge's motions. Prior to the beginning of trial, Attorney Kaiser filed a Motion to Withdraw, which the Honorable Conrad Capuzzi granted on June 3, 2009. Attorney Sally Frick subsequently entered her appearance as trial counsel.

On March 8, 2010, a jury convicted Sledge of possession with intent to deliver 13.2 grams of cocaine and possession with intent to deliver 100 grams of marijuana. On April 5, 2010, the trial court sentenced Sledge to

18-36 months' imprisonment for possession with intent to deliver cocaine and a consecutive term of 1-12 months' imprisonment for possession with intent to deliver marijuana. On October 24, 2011, this Court affirmed the judgments of sentence. ***Commonwealth v. Sledge***, 682 WDA 2010 (Pa.Super. filed October 24, 2011) (unpublished memorandum). On January 9, 2012, we denied reconsideration. Sledge did not appeal to the Pennsylvania Supreme Court.

On April 30, 2012, Sledge filed a counseled PCRA petition. On October 5, 2012, Sledge filed a *pro se* motion to seeking removal of his private counsel, Attorney Sally Frick, and appointment of new counsel by the court. On October 11, 2012, the court ordered the withdrawal of private counsel and appointment of new counsel. On October 15, 2012, Sledge filed an amended *pro se* PCRA petition alleging ineffective assistance of counsel. Appointed counsel did not file a counseled PCRA petition. On December 5, 2012, Sledge requested leave to proceed *pro se*. On May 13, 2013, the PCRA court conducted a hearing pursuant to ***Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998), and granted Sledge's request to represent himself at the PCRA evidentiary hearing. ***See id.*** at 82 ("When a waiver of the right to counsel is sought at the post-conviction and appellate stages, an on-the-record determination should be made that the waiver is a knowing, intelligent, and voluntary one"). On June 12, 2013, the court held an evidentiary hearing on Sledge's PCRA petition. On August 9, 2013, the court

denied Sledge's petition. Sledge filed a timely appeal and timely statement of matters complained of on appeal.

Sledge purports to present the following issues for our review:

> I. Whether the finding of a constitutional violation, which undermines the defense requires the granting of a new trial as to all cases in a consolidated trial?
>
> II. Whether a court may deny a PCRA claim for ineffective assistance of counsel based upon counsel's failure to adequately and properly prepare and present a defense with regard to character witness?
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> III. Whether a court may deny a PCRA claim for ineffective assistance of counsel based upon a clear showing of counsel failing to investigate and prepare a defense strategy?
>
> IV. Whether a court may deny a [d]efendant the [c]onstitutional [r]ight to face his accuser (i.e. Confidential Informant)?

Brief for Appellant at 3. There is a discrepancy between the statement of questions raised and the issues that Sledge briefs. The issues that Sledge briefs regarding counsel's ineffective assistance are: (1) the failure to call character witnesses; (2) the failure to object to Detective Haggerty's alleged hearsay testimony regarding other officers' roles during the execution of the search warrant, and the failure to subpoena the other police officers; (3) the failure to seek and obtain the identity of the confidential informant; (4) the failure to adequately represent Sledge in his Rule 600 motion; (5) previously stating inaccurate dates before this Court regarding a preliminary hearing. Notwithstanding our discretion to deem the questions raised as waived,[1] we discuss the issues that he briefs because we are able to address their merits.

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[1] Pennsylvania Rule of Appellate Procedure 2111 requires that an appellant's brief include, among other components, a statement of questions involved. Pursuant to Pennsylvania Rule of Appellate Procedure 2116, the statement of

(Footnote Continued Next Page)

Our standard of review from the denial of post-conviction relief "is limited to examining whether the court's determination is supported by the evidence of record and whether it is free of legal error." ***Commonwealth v. Ousley***, 21 A.3d 1238 (Pa.Super.2011) (citing ***Commonwealth v. Morales,*** 701 A.2d 516, 520 (Pa.1997)). The PCRA court's credibility determinations, when supported by the record, are binding on this Court." ***Commonwealth v. Spotz,*** 18 A.3d 244, 259 (Pa.2011) (citation omitted). "However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Id.***

For ineffectiveness of counsel claims, the petitioner must establish: "(1) that the underlying claim has merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors or omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." ***Ousley***, 21 A.3d at 1244

(Footnote Continued) ———————————

questions involved "must state concisely the issues to be resolved," and the rule instructs the parties that "[n]o question will be considered unless it is stated in the statement of questions involved or fairly suggested thereby." Thus, where issues are raised in the statement of questions involved, but not addressed in the argument section of the brief, courts may find waiver. ***See Harvilla v. Delcamp***, 555 A.2d 763, 764 n. 1 (Pa.1989) (issue included in statement of questions but not addressed in brief waived). ***Accord Commonwealth v. Kittelberger***, 616 A.2d 1, 3 n. 6 (Pa.Super.1992) (claim not specifically included in a statement of questions was not preserved for appellate review). ***But cf. Bailey v. Storlazzi***, 729 A.2d 1206, 1210 (Pa.Super.1999) (failure to include issues in statement of questions "may be overlooked where appellant's brief suggests the specific issue to be reviewed and appellant's failure does not impede our ability to address the merits of the issue").

(quoting ***Commonwealth v. Rivera,*** 10 A.3d 1276, 1279 (Pa.Super.2010)). "[C]ounsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant." ***Id.*** "The failure to prove any one of the three [ineffectiveness] prongs results in the failure of petitioner's claim." ***Id.*** (quoting ***Rivera***, 10 A.3d at 1279).

In his first issue on appeal, Sledge contends that trial counsel was ineffective for failing to present character witnesses on Sledge's behalf. "Failure to present available character witnesses may constitute ineffective assistance of counsel." ***Commonwealth v. Harris***, 785 A.2d 998, 1000 (Pa.Super.2001) (citing, e.g., ***Commonwealth v. Weiss***, 606 A.2d 439 (Pa.1992). "In the particular context of the alleged failure to call witnesses, counsel will not be deemed ineffective unless the PCRA petitioner demonstrates: (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. Miner***, 44 A.3d 684, 687 (Pa.Super.2012).

While trial counsel admitted during the PCRA evidentiary hearing that multiple character witnesses were willing and available to testify at Sledge's trial, N.T., 06/12/2013, at 18, counsel testified that she decided not to call character witnesses because Sledge had prior offenses that she believed the Commonwealth would use to impeach the witnesses' testimony. PCRA Court

Opinion, at 5. The PCRA court credited counsel's testimony, and the record supports this determination. We agree with the PCRA court that trial counsel had a reasonable strategic basis for not calling character witnesses to testify on Sledge's behalf, and that Sledge has failed to prove an essential prong of the ineffectiveness claim as it relates to failure to call character witnesses.

Sledge next contends that pre-trial counsel provided ineffective assistance by failing to object to Detective Haggerty's alleged hearsay testimony during the preliminary hearing and suppression hearing concerning the other officers' roles during the execution of the search warrant of Sledge's house, and by failing to subpoena the other officers.

Sledge's challenge to Detective Haggerty's testimony fails for two reasons. First, the detective's testimony was admissible under well-settled principles that hearsay evidence is admissible during preliminary hearings[2] and suppression hearings.[3] In addition, the detective's testimony regarding the other officers' roles was admissible under the "course of conduct" exception to the hearsay rule to show the information upon which the detective acted. ***See Commonwealth v. Dent***, 837 A.2d 571, 579

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[2] ***See, e.g., Commonwealth v. Tyler***, 587 A.2d 326, 328 (Pa.Super.1991) (hearsay is admissible at preliminary hearing hearsay evidence so long as hearsy is not sole basis for establishing prima facie case against defendant).

[3] ***See, e.g., Commonwealth v. Bunch***, 477 A.2d 1372, 1376 (Pa.Super.1984) (determination of probable cause may be based on hearsay; it is not error to admit hearsay testimony at suppression hearing).

(Pa.Super.2003). Second, any errors that took place during Sledge's preliminary hearing testimony were immaterial because the Commonwealth established Sledge's guilt beyond a reasonable doubt at trial. ***Tyler***, ***supra***, 587 A.2d at 328.

Equally meritless is Sledge's claim that pretrial counsel was ineffective for failing to subpoena the other police officers present in Sledge's home during the execution of the search warrant to testify at the preliminary hearing. Pre-trial counsel stated during the PCRA evidentiary hearing that the defense typically does not present witnesses during a preliminary hearing. The PCRA court found this explanation credible, and the record supports this finding. The preliminary hearing is not a full-fledged trial. The magisterial district justice who presides over the preliminary hearing merely determines whether the Commonwealth has established a prima facie case without assessing the credibility of the witnesses. ***Liciaga v. Court of Common Pleas of Lehigh County***, 566 A.2d 246, 248 (Pa.1989). In this case, Sledge fails to demonstrate how the result of the preliminary hearing would have been different had pretrial counsel subpoenaed other police officers. Moreover, as stated above, any errors that took place during Sledge's preliminary hearing testimony were immaterial, because the Commonwealth subsequently established Sledge's guilt beyond a reasonable doubt at trial. ***Tyler***, ***supra***, 587 A.2d at 328.

Sledge's third issue on appeal — pre-trial and trial counsel were ineffective for failing to seek and obtain the identity the confidential informant ("CI") — also lacks merit. Pursuant to Pa.R.Crim.P. 573, prior to trial, the court has the discretion to require the Commonwealth to reveal the names and addresses of all eyewitnesses, including confidential informants, where the defendant makes a showing of material need and reasonableness:

> (a) In all court cases, except as otherwise provided in Rule 230 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:
>
> (i) the names and addresses of eyewitnesses. . . .

Pa.R.Crim.P. 573(B)(2)(a)(i). When the defendant seeks discovery of the identity of a confidential source, however,

> [t]he Commonwealth enjoys a qualified privilege to withhold the identity of a confidential source. ***Commonwealth v. Bing***, [551 Pa. 659, 663-65, 713 A.2d 56, 58]; ***Commonwealth v. Roebuck***, 545 Pa. 471, 681 A.2d 1279, 1283 n. 6 (1996). In order to overcome this qualified privilege and obtain disclosure of a confidential informant's identity, a defendant must first establish, pursuant to Rule 573(B)(2)(a)(i), that the information sought is material to the preparation of the defense and that the request is reasonable. ***Roebuck, supra*** at 1283. Only after the defendant shows that the identity of the confidential informant is material to the defense is the trial court required to exercise its discretion to determine whether the information should be revealed by balancing relevant factors, which are

> initially weighted toward the Commonwealth. ***Bing, supra*** at 58; ***Commonwealth v. Herron,*** 475 Pa. 461, 380 A.2d 1228 (1977).

Commonwealth v. Marsh, 997 A.2d 318, 321-22 (Pa.2010). Not only must the court strike the proper balance between "the public interest in protecting the flow of information against the individual's right to prepare his defense," but it must also weigh

> fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations[,] the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

Commonwealth v. Carter, 233 A.2d 284, 287 (1967) (quoting ***Roviaro v. United States,*** 353 U.S. 53, 60–62, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)).

This Court has held repeatedly that disclosure of the CI's identity is unnecessary when the CI is not an eyewitness to the transaction for which the defendant is charged. ***Commonwealth v. Withrow***, 932 A.2d 138, 140 (Pa.Super.2007); ***Commonwealth v. Belenky,*** 777 A.2d 483, 488 (Pa.Super.2001), *appeal denied,* 863 A.2d 1148 (2004).

In ***Belenky***, the defendant sought disclosure of the identity of an informant who had participated with police in a controlled buy at the defendant's home. ***Id.***, 777 A.2d at 485. The police relied upon the controlled buy to establish probable cause for the issuance of a warrant. ***Id.***

Three days after the controlled buy, the police executed the warrant and seized multiple packets of cocaine and heroin.

The defendant moved for disclosure of the informant's identity in an attempt to bolster his defense of mistaken identity. The defendant argued that the informant was the only non-police witness to have observed the controlled buy and that, consequently, his testimony was both material and necessary. ***Id.*** at 487. The trial court reasoned that the informant's identity was not relevant to the drug charges against the defendant because the charges stemmed not from the controlled buy itself, but from the recovery of controlled substances in the defendant's home three days later. ***Id***. at 488.

This Court affirmed. It observed that regardless of whether the informant was an eyewitness to the transaction for which the defendant was charged, the informant's identity was not material to whether probable cause existed to search the defendant's house:

> The cases appellant cites involve charges based on single transaction sales; that is not the charge here. Appellant was charged with the offenses resulting from the search, not the sale, and the validity of that search has nothing to do with the identity of the man who sold drugs to the officer on January 30. Whether that man was appellant or not, it established probable cause [to search the house] and the search would still have occurred three days later. At the search, appellant would have been found in possession of the drugs, no matter the seller's identity three days before. We see no indication the informant was present when the search took place; the informant could add nothing to the question of identity then, which is the only identity relevant to guilt.

Id. Absent any showing that the informant's identity was material, "the trial court had no duty to balance the competing interests to determine if disclosure was required. Accordingly, the trial court did not abuse its discretion by denying appellant's motion to disclose the identity of the confidential informant." ***Id***.

Similarly, in ***Withrow***, the police obtained a warrant on the basis of a CI's controlled buy two days earlier at the defendant's house. The CI had arrived at the home with $20 in pre-recorded currency and left with four packets of crack, which he turned over to police. The police executed a search warrant at the house two days later and discovered crack cocaine and assorted paraphernalia. The trial court dismissed all charges when the Commonwealth failed to disclose the CI's identity. The Superior Court reversed on the basis that the defendant failed to overcome the Commonwealth's qualified privilege:

> Like the informant in ***Belenky***, the CI's account afforded no more than evidence of probable cause for the issuance of a search warrant for the defendant's home. The CI was not present two days later when the warrant was executed, and the controlled substances, the possession and distribution of which formed the basis of the charges at issue, would have been found regardless of whether the CI identified Withrow.

Id., 932 A.2d at 142.

In light of ***Belenky*** and ***Withrow***, the PCRA court properly denied Sledge's claim that counsel was ineffective for failure to seek and obtain the CI's identification. Sledge was charged with offenses resulting from the

search of his house, not the sale of drugs to the CI. The validity of the search of his house has nothing to do with the identity of the CI. Whether the man who sold drugs to the CI was Sledge or not, the sale established probable cause to search the house, and the subsequent search still would have occurred. During the search, Sledge would have been found in possession of the drugs, regardless of the seller's identity during the sale. And as in ***Belenky*** and ***Withrow***, the CI was not present when the police executed the search warrant for Sledge's residence, so "the controlled substances, the possession and distribution of which formed the basis of the charges at issue, would have been found regardless of whether the CI identified [Sledge]." ***Withrow***, 932 A.2d at 142. Moreover, the evidence in this case overwhelmingly established Sledge's guilt. Detective Haggerty credibly testified that Sledge admitted selling cocaine during the properly executed search and after police found drugs and administered ***Miranda***[4] warnings. N.T., 03/02/2010, at 72-3.

Sledge next argues pre-trial counsel provided ineffective representation during Rule 600 proceedings by failing to argue that Sledge was not served with the criminal complaint (and the trial did not commence) within 365 days from the date on which the complaint was filed. Sledge has waived this argument by failing to raise it in his statement of matters

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[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

complained of on appeal. ***Commonwealth v. Garland***, 63 A.3d 339, 342 (Pa.Super.2013) (defendant waived his claim that firearm he discarded while fleeing from police should have been suppressed, where defendant did not include the issue in his court-ordered statement of errors complained of on appeal). Even if Sledge had preserved this claim for appeal, it lacks merit. Pre-trial counsel filed a Rule 600 motion raising the specific issue of whether the Commonwealth acted with due diligence in locating and serving Sledge with the criminal complaint. During the Rule 600 evidentiary hearing, counsel argued that the delay in locating Sledge prejudiced the criminal proceedings against him. N.T., 10/17/08, pp. 14-22. The trial court determined the Commonwealth acted diligently:

> [T]he arresting officer, Ronald J. Haggerty, Jr.: went to [Sledge's] residence in which his mother resides on several occasions and sent warrant teams to the residence during warrant sweeps; checked with the Connellsville Post Master; attempted to locate [Sledge's] ex-girlfriend; spoke to [Sledge's] friends; checked places [Sledge] was known to frequent[;] performed an Internet search for [Sledge;] entered [Sledge] on NCIC; and, completed forms notifying any government [agency] that there was a warrant for [Sledge].

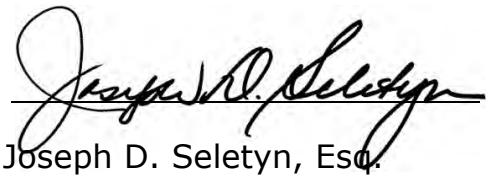
Trial Court Order, January 26, 2009, at 1-2. In short, counsel did everything he reasonably could have done to provide effective representation in the Rule 600 proceedings. Sledge's claim of ineffective assistance lacks substance.

Lastly, Sledge argues that appellate counsel made erroneous statements regarding a hearing date before a magistrate judge. Sledge does not develop this argument in his brief; rather, he makes conclusory

statements that appellate counsel's inaccurate information caused him great prejudice. Brief for Appellant, at 11. Absent proof of prejudice, Sledge's argument does not warrant relief. ***Commonwealth v. Lambert***, 568 Pa. 346, 797 A.2d 232 (Pa. 2001) (conclusory statements regarding appellate counsel's ineffectiveness inadequate to establish right to PCRA relief).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014