

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

BRIAN REEVES

Appellant

No. 155 EDA 2013

Appeal from the PCRA Order December 14, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-1103451-2004

BEFORE: GANTMAN, P.J., JENKINS, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, P.J.:

FILED JULY 09, 2014

Appellant, Brian Reeves, appeals from the order entered in the Philadelphia County Court of Common Pleas, denying his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm and grant counsel's petition to withdraw.

The relevant facts and procedural history of this appeal are as follows. On October 4, 2004, Appellant punched the victim in the face after a dispute over a traffic accident. When the victim tried to obtain the license plate number for Appellant's vehicle, Appellant brandished a firearm and shot at the victim. Following a bench trial, the court convicted Appellant of

¹ 42 Pa.C.S.A. §§ 9541-9546.

*Former Justice specially assigned to the Superior Court.

aggravated assault and possessing an instrument of crime. On March 29, 2006, the court sentenced Appellant to an aggregate term of ten (10) to twenty (20) years' imprisonment, followed by five (5) years' probation. This Court affirmed the judgment of sentence on December 21, 2007, and Appellant did not seek further review.

On December 4, 2008, Appellant timely filed a *pro se* PCRA petition, alleging trial counsel failed to advise Appellant of his right to testify at trial. The court appointed counsel, who filed an amended petition on October 22, 2009. Thereafter, PCRA counsel filed a "no-merit" letter pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (*en banc*). On June 2, 2010, the court denied PCRA relief and permitted counsel to withdraw.

Appellant timely filed a *pro se* notice of appeal on July 1, 2010. On June 8, 2011, this Court vacated the order denying PCRA relief and remanded the case with instructions for an evidentiary hearing to determine if trial counsel failed to advise Appellant of his right to testify at trial. Upon remand, the court appointed new counsel to represent Appellant. The court also conducted three hearings on Appellant's ineffectiveness issue. On December 14, 2012, the court again denied PCRA relief.

Appellant timely filed a notice of appeal on January 7, 2013. The court subsequently appointed new counsel ("Attorney Scott") to represent

Appellant on appeal. Attorney Scott entered his appearance with this Court on February 26, 2013. Nevertheless, Attorney Scott failed to file a brief on Appellant's behalf. On May 16, 2013, this Court remanded the matter for a determination of whether Attorney Scott had abandoned Appellant. This Court also ordered the PCRA court to take any further action required to protect Appellant's right to appeal.

Upon remand, the PCRA court determined Attorney Scott did not abandon Appellant. In response, this Court established a new briefing schedule. On September 10, 2013, Attorney Scott filed an application to withdraw as counsel and a brief pursuant to ***Anders v. California***, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In response, Appellant obtained private counsel ("Attorney Gelman"), who entered his appearance with this Court on September 11, 2013. On September 16, 2013, Attorney Gelman filed an application to strike Attorney Scott's ***Anders*** brief. On September 20, 2013, this Court denied Attorney Gelman's motion to strike without prejudice to his ability to re-raise the claim. This Court also vacated the briefing schedule and ordered Attorney Scott to file a new brief.

Attorney Scott filed a ***Turner/Finley*** letter-brief on November 21, 2013. On December 6, 2013, this Court directed Attorney Scott to indicate whether he would proceed with the September 2013 ***Anders*** brief or the November 2013 ***Turner/Finley*** letter-brief. This Court also confirmed that Attorney Scott's application to withdraw remained pending. Further, this

Court provided Attorney Gelman with a deadline of January 21, 2014, for the filing of an advocate's brief. On December 20, 2013, Attorney Scott notified this Court of his desire to proceed with the **Turner/Finley** letter-brief, which this Court accepted on January 29, 2014. That same day, this Court struck Attorney Scott's **Anders** brief and granted an extension to Attorney Gelman for the filing of an advocate's brief. Ultimately, Attorney Gelman filed an advocate's brief on March 11, 2014.

As a preliminary matter, we must address Attorney Scott's withdrawal request. "Before an attorney can be permitted to withdraw from representing a petitioner **under the PCRA**, Pennsylvania law requires counsel to file and obtain approval of a 'no-merit' letter pursuant to the mandates of **Turner/Finley**." **Commonwealth v. Karanicolas**, 836 A.2d 940, 947 (Pa.Super. 2003) (emphasis in original).

[C]ounsel must...submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa.Super. 2007). Counsel must also send to the petitioner a copy of the "no-merit" letter or brief and petition to withdraw and advise the petitioner of his right to proceed *pro se* or with new counsel. **Id.** "Substantial compliance with these requirements will satisfy the criteria." **Karanicolas, supra** at 947.

Instantly, Attorney Scott filed a **Turner/Finley** letter-brief and motion to withdraw as counsel with this Court. Attorney Scott listed the issues Appellant wished to raise and explained why the issues merit no relief. Attorney Scott indicated that he sent Appellant a copy of the “no-merit” letter-brief and motion to withdraw, as well as an explanation of Appellant’s right to proceed *pro se* or with private counsel. Thus, Attorney Scott has substantially complied with the **Turner/Finley** requirements. Accordingly, we proceed to an independent evaluation of the record. **See Commonwealth v. Widgins**, 29 A.3d 816 (Pa.Super. 2011) (stating court must conduct independent review of record and agree with counsel that issues raised were meritless).

As Attorney Gelman has filed an advocate’s brief on Appellant’s behalf, we review this appeal on the basis of the issues raised in the advocate’s brief:

WAS TRIAL COUNSEL INEFFECTIVE BECAUSE HE FAILED TO INFORM APPELLANT OF HIS RIGHT TO TESTIFY, OF THE FACT THAT THE CHOICE AS TO WHETHER HE TESTIFIED OR NOT WAS HIS AND HIS ALONE TO MAKE, AND HE COULD ACCEPT OR REJECT COUNSEL’S ADVICE ON THE SUBJECT?

WAS THERE NO REASONABLE BASIS FOR TRIAL COUNSEL TO DEPRIVE APPELLANT OF PROPER ADVICE AS TO HIS RIGHT TO TESTIFY AND APPELLANT WAS PREJUDICED BECAUSE HE DID NOT RECEIVE PROPER ADVICE?

CAN WAIVER BE PRESUMED FROM THIS SILENT RECORD AND IS PREJUDICE PRESUMED?

(Appellant’s Brief at 7).

On appeal, Appellant acknowledges that he was in an altercation with the victim. Appellant contends, however, he could not have shot the victim, because he had surgery ten days before the incident, and he was barely able to move. Appellant avers the rendition of the facts he provided at the PCRA hearing was consistent with his trial witnesses' testimony. Appellant asserts he would have testified at trial in his own defense, but trial counsel did not advise him of his right to testify. Appellant insists counsel had no reasonable basis for failing to advise him of his right to testify. Appellant also maintains that counsel's inaction resulted in prejudice, because Appellant did not take the stand to counter the victim's inculpatory testimony. Appellant concludes trial counsel was ineffective for failing to advise him of his right to testify. We disagree.

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). We give no such deference, however, to the court's legal conclusions. ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa.Super. 2012). Traditionally, credibility issues are

resolved by the trier of fact who had the opportunity to observe the witnesses' demeanor. **Commonwealth v. Abu-Jamal**, 553 Pa. 485, 720 A.2d 79 (1998), *cert. denied*, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 38 (1999). Where the record supports the PCRA court's credibility resolutions, they are binding on this Court. **Id.**

The law presumes counsel has rendered effective assistance. **Commonwealth v. Williams**, 597 Pa. 109, 950 A.2d 294 (2008). When asserting a claim of ineffective assistance of counsel, the petitioner is required to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his 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. Kimball**, 555 Pa. 299, 724 A.2d 326 (1999). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. **Williams, supra.**

"The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit...." **Commonwealth v. Pierce**, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." **Commonwealth v. Poplawski**, 852 A.2d 323, 327 (Pa.Super. 2004).

Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was

designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective.

Pierce, supra at 524, 645 A.2d at 194-95 (internal citations omitted).

Prejudice is established when [a defendant] demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In [**Kimball, supra**], we held that a "criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Commonwealth v. Chambers, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002) (some internal citations and quotation marks omitted).

The decision whether to testify on one's own behalf is ultimately to be made by the defendant after full consultation with counsel.

Commonwealth v. Michaud, 70 A.3d 862 (Pa.Super. 2013).

In order to sustain a claim that counsel was ineffective for failing to advise the appellant of his rights in this regard, the appellant must demonstrate either that counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf.

Id. at 869 (quoting **Commonwealth v. Nieves**, 560 Pa. 529, 533, 746 A.2d 1102, 1104 (2000)).

Instantly, Appellant testified at the October 4, 2012 evidentiary hearing. At that time, Appellant provided his version of the underlying facts,

explaining what he would have testified to at trial. Specifically, Appellant claimed to have been the passenger in a vehicle driven by Beverly Thompson. While driving down 66th Avenue, Appellant and Ms. Thompson heard a collision behind them. Ms. Thompson stopped, and Appellant exited their vehicle to investigate. At that point, Appellant exchanged words with the victim, who was involved in the collision. Appellant quickly reentered his vehicle, and Ms. Thompson drove off. Appellant did not hear any gunshots, and he did not know that a shooting had occurred until the police arrested him the next day.

On cross-examination, Appellant admitted that trial counsel provided some consultation regarding his right to testify:

[COMMONWEALTH]: All right. And did you talk with [trial counsel] about testifying?

[APPELLANT]: Yes.

[COMMONWEALTH]: All right. And what did you tell him?

[APPELLANT]: I told him—I told him what I just said. I told him what I just testified to, and he told me, “Don’t worry about it, because the judge is not going to go for this guy and his story.”

[COMMONWEALTH]: Okay.

[APPELLANT]: And, “Don’t even worry about it.”

* * *

[COMMONWEALTH]: Okay, so [trial counsel] didn’t say, “You’re not allowed to testify,” correct?

[APPELLANT]: He told me I didn't have to testify.

[COMMONWEALTH]: Did he say you're not allowed to testify?

[APPELLANT]: No, he didn't say I wasn't allowed to testify. I didn't ask him was I allowed to testify.

(**See** N.T. PCRA Hearing, 10/4/12, at 54-56.)²

In light of the evidence presented at the evidentiary hearings, the PCRA court evaluated Appellant's issue as follows:

Interestingly, [Appellant] did not unequivocally state that his attorney never broached the subject of his testifying in his own behalf. Rather, [Appellant] described a discussion in which he told his attorney that he wanted to testify and what he wanted to say. [Appellant] indicates that his attorney advised against it. Clearly, the subject was discussed and [Appellant] knew about his right to testify. Indeed [trial counsel] had represented [Appellant] several times in criminal matters before this case.

Moreover, the decision for [Appellant] not to testify is not only supported by but also acquiesced [to] from the defense presented at trial. One witness testified that he was familiar with [Appellant] and [Appellant] was not present at the scene during the incident. The second witness placed [Appellant] in a wheelchair, wheelchair-bound, during a funeral which took place approximately ten days prior to the underlying incident[,], offered to establish [Appellant's] lack of ability to commit the crime. It would have been factually fatal for [trial counsel] to present [Appellant's] testimony that he jumped from the car and was involved in the altercation but that someone,

² Trial counsel did not testify at the PCRA hearings. The parties stipulated trial counsel was suffering from kidney failure, and he did not recall representing Appellant. (**See** N.T. PCRA Hearing, 10/4/12, at 10.).

unbeknownst to him, shot the complainant. [Appellant] was not credible; he knew of his right to testify and chose to present a defense that he was neither at the scene of the incident nor capable of participating in such altercation since he had been in a wheelchair.

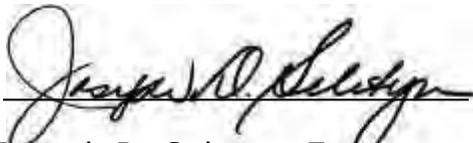
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Finally, [Appellant's] testimony elicited at the hearing to show what [Appellant] would have testified [to] before the court if called at trial failed to establish that [t]here is [any] reasonable probability that the result would have been different. Therefore, counsel would not have been ineffective even if it had been counsel's sole decision not to call [Appellant].

(**See** PCRA Court Opinion, filed February 28, 2013, at 3-4) (internal citations and quotation marks omitted). Here, the record supports the PCRA court's determination that Appellant's claim of effective assistance of trial counsel merited no relief on the ground asserted. **See Chambers, supra; Pierce, supra; Michaud, supra.** Accordingly, we affirm the order denying PCRA relief and grant counsel's petition to withdraw.

Order affirmed; petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014