NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOHN BALKCOM, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1622 MDA 2013

Appeal from the PCRA Order August 23, 2013
In the Court of Common Pleas of Daupin County
Criminal Division at No(s): CP-22-CR-0000083-2009, CP-22-CR-0000085-2009

BEFORE: BENDER, P.J.E., MUNDY, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J. **FILED JULY 15, 2014**

John Balkcom, Jr. appeals *pro se* from the order dismissing his petition filed pursuant to the Post Conviction Relief Act ("PCRA").[1] After careful review, we affirm.

A jury found Balkcom guilty of two counts of robbery[2] and two counts of conspiracy to commit robbery[3]. On September 9, 2009, the trial court sentenced Balkcom to an aggregate sentence of 10-20 years' imprisonment. He filed a direct appeal to this Court, which affirmed his judgment of

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[1] 42 Pa.C.S. §§ 9541-9546.

[2] 18 Pa.C.S. § 3701(a)(1)(ii).

[3] 18 Pa.C.S. § 903(c).

sentence on February 4, 2011. On June 6, 2011, the Supreme Court denied his petition for allowance of appeal.

On May 1, 2012, Balkcom filed a timely PCRA petition *pro se* alleging ineffective assistance of counsel. The PCRA court appointed counsel, who filed a motion to withdraw under ***Commonwealth v. Turner***, 544 A.2d 927 (Pa.1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super.1988). On June 10, 2013, the PCRA court filed a Pa.R.Crim.P. 907 notice of intent to dismiss the PCRA petition without a hearing ("notice of intent") and granted counsel's motion to withdraw. On June 26, 2013, Balkcom filed a response in opposition to the court's notice of intent. On August 23, 2013, the PCRA court entered an order dismissing Balkcom's PCRA petition. Balkcom timely appealed and filed a timely Pa.R.A.P. 1925(b) statement of matters complained of on appeal. The PCRA court filed a letter adopting the reasoning from its notice of intent.

Balkcom raises the following issues in his Rule 1925(b) statement:

1. Trial counsel was ineffective in refusing to file suppression motions.
2. Counsel was ineffective in failing to argue the sufficiency and weight of the evidence.
3. PCRA counsel was ineffective and failed to raise all underlying issues. Counsel's ***Finley*** letter was also defective.
4. Appellant moves for nunc pro tunc relief to reinstate appeal rights under extraordinary circumstances.
5. [Appellant was] denied a constitutionally fair trial where [he] was only identified at trial by key Commonwealth witness (sic). (No instruction given).
6. [Appellant was] denied a constitutionally fair trial, and ineffective assistance of counsel (sic), where no

evidence was presented to prove [him] guilty of [the] second robbery, and counsel failed to move to suppress. (Prosecutorial misconduct)

7. Counsel was ineffective in failing to impeach the contradicted testimony of [the] Commonwealth's witness.

For ease of discussion, we group these seven issues into three categories:

(1) a challenge to the sufficiency and weight of the evidence, which encompasses issue 2 of Balkcom's Rule 1925(b) statement and a portion of issue 6;

(2) a claim that counsel was ineffective for failing to move to suppress evidence and impeach the Commonwealth's witnesses, which encompasses issues 1, 5 and 7 of his Rule 1925(b) statement and a portion of issue 6;

(3) a generalized request for relief, which encompasses issues 3 and 4 of his Rule 1925(b) statement.

We first determine that Balkcom has waived all issues on appeal by failing to state them with specificity in his Rule 1925(b) statement. ***Commonwealth v. Lemon***, 804 A.2d 34, 37 (Pa.Super.2002) (finding waiver when Rule 1925(b) statement fails adequately to identify issues sought to be pursued on appeal; "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all") (citations omitted).

Even if Balkcom preserved any of these issues, they are devoid of merit.

In an appeal from an order denying PCRA relief, we must "determine whether the determination of the PCRA court is supported by the evidence of record and 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." ***Commonwealth v. Barndt***, 74 A.3d 185, 191-192 (Pa.Super.2013) (internal quotations and citations omitted).

When a PCRA petitioner alleges trial counsel's ineffectiveness,

> he must prove by a preponderance of the evidence that his conviction or sentence resulted from 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. We have interpreted this provision in the PCRA to mean that the petitioner must show: (1) that his claim of counsel's ineffectiveness has merit; (2) that counsel had no reasonable strategic basis for his action or inaction; and (3) that the error of counsel prejudiced the petitioner-i.e., that there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. We presume that counsel is effective, and it is the burden of Appellant to show otherwise.

Commonwealth v. duPont, 860 A.2d 525, 531 (Pa.Super.2004) (internal citations and quotations omitted). The petitioner bears the burden of proving all three prongs of this test. ***Commonwealth v. Meadows***, 787 A.2d 312, 319-320 (Pa.2001). If he fails to prove any of these prongs by a preponderance of the evidence, the Court need not address the remaining prongs of the test." ***Commonwealth v. Fitzgerald***, 979 A.2d 908, 911 (Pa.2010) (citation omitted).

Sufficiency and weight of evidence. Balkcom's challenge that counsel was ineffective for failing to challenge the sufficiency of the evidence fails because the evidence of his crimes, robbery and conspiracy to commit robbery, is palpable from the record. When examining the sufficiency of evidence, our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super.2011), *appeal denied*, 32 A.3d 1275 (Pa.2011).

On the evening of October 24, 2008, Heather Hoffmaster and Balkcom, whom Hoffmaster knew as "Buck", devised a plan in which

Hoffmaster would lure males out of Harrisburg bars in order for Balkcom and another man (nicknamed "Haze") to rob them on the street. Trial Transcript ("Tr."), pp. 176-200. Later that evening, Hoffmaster lured Michael Boyle out of a bar named Ceoltas. ***Id***., pp. 39-53, 180-85. Hoffmaster observed Balkcom and Haze accost Boyle several blocks from the bar and take Boyle's wallet. ***Id***., pp. 39-53, 186-89. Balkcom held a gun to Boyle's ribs during the incident. ***Id***.

In the early morning hours of October 25, 2008, Hoffmaster lured Richard Mather out of the Quarters Bar by promising to dance for him. ***Id***., pp. 58-77, 193-97. Haze and another unidentified man holding a gun held Mather up in an alley. ***Id***., pp. 68-72, 195-97. Mather was unable to identify his assailants.

Hoffmaster and the two victims, Boyle and Mather, testified at trial. Hoffmaster identified Balkcom as the man she knew as "Buck". ***Id***., pp. 169-70. Another individual, LaTanya Patterson, an acquaintance of Hoffmaster, testified that during a car ride earlier that evening, she overheard Hoffmaster, Balkcom and Haze discussing their plan to rob male victims. ***Id***., pp. 120-23. Patterson later observed Balkcom walk toward the Ceoltas bar. ***Id***., 124-25. On the witness stand, Patterson looked toward Balkcom and identified him as one of the members of the conspiracy. ***Id***., pp. 131, 135.

Based on the evidence, Balkcom's claim that trial counsel was ineffective for failing to object to the sufficiency of the evidence lacks

arguable merit. Hoffmaster clearly identified Balkcom as a participant in Boyle's robbery. Although neither Hoffmaster nor Mather identified Balkcom as a participant in Mather's robbery, there still was sufficient circumstantial evidence to convict him of Mather's robbery, since (1) Balkcom agreed with Hoffmaster and Haze that Balkcom and Haze would ambush males that Hoffmaster lured outside of Harrisburg bars, (2) Hoffmaster enticed Mather out of a bar; (3) two males – the same number of men who formed the conspiracy with Hoffmaster earlier that evening – assaulted Mather in an alley; (4) one of Mather's assailants was holding a gun, and (5) Balkcom had held a gun during Boyle's robbery earlier that night.

Similarly, Balkcom's claim that counsel was ineffective for failing to challenge the weight of the evidence lacks arguable merit. "A weight of the evidence claim concedes that the evidence is sufficient to sustain the verdict, but seeks a new trial on the ground that the evidence was so one-sided or so weighted in favor of acquittal that a guilty verdict shocks one's sense of justice." ***Commonwealth v. Lyons***, 79 A.3d 1053, 1067 (Pa.2013). Appellate review of a weight claim

> is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the

> lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa.2013) (citations omitted). Based on our review of the record, we see nothing to indicate that a motion for a new trial would have been successful. Balkcom argues that (1) Patterson's in-court identification was unreliable; (2) Hoffmaster gave favorable testimony for the Commonwealth in return for leniency in her own criminal cases; and (3) Hoffmaster's testimony was contradictory. Viewed together, these claims did not tip the scales in favor of acquittal such that the guilty verdict shocked the conscience.

Suppression of evidence. For three reasons, Balkcom's claim that trial counsel was ineffective for failing to file suppression motions lacks arguable merit. First, Balkcom misapprehends the nature of a proper suppression motion. He argues that trial counsel should have moved to suppress the evidence of the second robbery because none of the eyewitnesses placed him at the scene of the crime. Brief For Appellant, p. 5. This is a challenge to the sufficiency of the evidence, not a suppression claim that the police obtained evidence in violation of Balkcom's rights. Pa.R.Crim.P. 581(A) (purpose of motion to suppress is to seek exclusion of "any evidence alleged to have been obtained in violation of the defendant's rights").

Second, the record reflects that trial counsel in fact litigated a motion to suppress Patterson's in-court identification of Balkcom as unreliable. Tr., pp. 145-49. The court overruled his objection on the ground that Patterson had sufficient opportunity to observe and identify Balkcom. ***Id***. When analyzing the admission of identification evidence, a suppression court must determine "whether the challenged identification has sufficient indicia of reliability[.]" ***Commonwealth v. Bruce,*** 717 A.2d 1033, 1037 (Pa.Super.1998). This question is examined by focusing on the totality of the circumstances surrounding the identification. ***Id.*** at 1036. In deciding the reliability of an identification, a suppression court should evaluate the opportunity of the witness to see the criminal at the time the crime occurred, the witness's degree of attention, the accuracy of any description given, the level of certainty when identification takes place, and the period between the crime and the identification. ***Id.*** at 1037. Based on our review of the record, we agree with the trial court that Patterson had adequate opportunity to observe Balkcom while riding in the car with him and walking with him toward the Ceoltas bar on the evening of the robberies. Although trial counsel argued that Patterson hesitated before identifying Balkcom in court, Tr., p. 146, this objection went to the weight of Patterson's testimony, not its admissibility. ***Commonwealth v. Washington***, 927 A.2d 586, 601

(Pa.2007) (witness's inability to identify capital defendant at police line-up did not affect the admissibility of her in-court identification, but only its weight and credibility).[4]

Third, having reviewed the record, we do not see any other issues that could have been the subject of a suppression motion.

Balkcom also contends that trial counsel was ineffective for failing to impeach Commonwealth witnesses. Our review of the record indicates that counsel did a careful job cross-examining the Commonwealth witnesses, and we see no breach of his duty to provide effective representation.

General claims of ineffectiveness. According to Balkcom, PCRA counsel was ineffective in failing to raise all underlying issues and in filing a defective ***Finley*** letter seeking leave to withdraw as counsel. Our Supreme Court has explained the procedure required for court-appointed counsel to withdraw from PCRA representation:

> [***Turner*** and ***Finley***] establish the procedure for withdrawal of court-appointed counsel in collateral attacks on criminal convictions. Independent review of the record by competent

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[4] Our resolution of this issue also disposes of the claim in the fifth issue of Balkcom's Rule 1925(b) statement that Balkcom was "denied a constitutionally fair trial where [he] was only identified at trial by [a] key Commonwealth witness." As discussed above, not one but two Commonwealth witnesses identified Balkcom at trial, and the evidence of both identifications was admissible. Furthermore, this discussion disposes of the claim in in the sixth issue of Balkcom's Rule 1925(b) statement that counsel "failed to move to suppress," since counsel actually did move to suppress evidence.

> counsel is required before withdrawal is permitted. Such independent review requires proof of:
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> 1) A "no-merit" letter by PCRA counsel detailing the nature and extent of his [or her] review;
>
> 2) A "no-merit" letter by PCRA counsel listing each issue the petitioner wished to have reviewed;
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> 3) The PCRA counsel's "explanation", in the "no-merit" letter, of why the petitioner's issues were meritless;
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> 4) The PCRA court conducting its own independent review of the record; and
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> 5) The PCRA court agreeing with counsel that the petition was meritless.

Commonwealth v. Pitts, 981 A.2d 875, 876 n.1 (Pa.2009) (citations omitted). In addition, this Court has required that PCRA counsel who seeks to withdraw must:

> contemporaneously serve a copy on the petitioner of counsel's application to withdraw as counsel, and must supply the petitioner both a copy of the "no-merit" letter and a statement advising the petitioner that, in the event the court grants the application of counsel to withdraw, he or she has the right to proceed *pro se* or with the assistance of privately retained counsel.

Commonwealth v. Friend, 896 A.2d 607, 614 (Pa.Super.2006) (emphasis deleted).

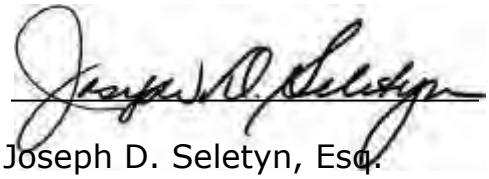
Here, counsel complied with these requirements by filing the requisite "no merit" letter which adequately explained why Balkcom's claims lacked merit. Counsel also served Balkcom with a copy of the no merit letter. We agree with counsel's assessment that Appellant's claims lack merit for the

reasons provided above. "[C]ounsel cannot be deemed ineffective for failing to pursue a meritless claim." ***Commonwealth v. Koehler***, 36 A.3d 121, 144 (Pa.2012). Further, our independent review of the record has revealed no other issues of arguable merit. Thus, the PCRA court properly denied Balkcom's PCRA petition without a hearing.

Finally, we reject Balkcom's claim that extraordinary circumstances exist that warrant reinstatement of his appellate rights. His appellate rights do not require reinstatement because he was able to exercise them on direct appeal and in the present appeal.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014