

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROBERT CHRISTOPHER ALBORRAN, JR.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1958 MDA 2013

Appeal from the PCRA Order October 22, 2013
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0005184-2010

BEFORE: BOWES, WECHT, and MUSMANNO, JJ.

MEMORANDUM BY BOWES, J.:

FILED DECEMBER 23, 2014

Robert Christopher Alborran, Jr. appeals from the October 22, 2013 order denying PCRA relief. We affirm.

A jury convicted Appellant of burglary, criminal trespass, terroristic threats, criminal conspiracy to commit robbery, and three counts of theft by unlawful taking, and the court sentenced him to eleven to twenty-two years imprisonment. Appellant filed a direct appeal to this Court, and we affirmed the judgment of sentence. ***Commonwealth v. Alborran, Jr.***, 50 A.3d 244 (Pa.Super. 2012) (unpublished memorandum). Appellant's convictions stemmed from his July 20, 2010 unauthorized entry into the apartment of Rhiannon Lynch in York, Pennsylvania. Appellant, at gunpoint, demanded that the occupants give him their cell phones. He and his accomplices left with two pairs of shoes, two cell phones, \$300 in cash, and a purse, but not

before threatening to return and kill them if they reported the incident to the police.

Ms. Lynch provided police with the identities of the intruders. She also described the silver handgun Appellant was carrying. At trial, Appellant testified on his own behalf, denying any participation in the home invasion and robbery. On direct examination, the following exchange occurred:

[Defense Counsel]: Did you ever own a pair of Jordan sneakers?

[Appellant]: Yeah. I had quite a few pair.

[Defense Counsel]: Any like the ones Rhiannon described, green and –

[Appellant]: No. I never had a pair of them.

[Defense Counsel]: Did you ever possess a silver pistol?

[Appellant]: No, sir.

[Defense Counsel]: Did you commit the robbery and threats on July 20th against Rhiannon Lynch and Chris Beckey?

[Appellant]: No, sir, but I do know that Rhiannon was upset at me after denying her the money.

N.T., Jury Trial, 3/17-18/11, at 61.

Following this exchange, counsel for the Commonwealth sought permission to approach the bench. The Commonwealth advised the court that Appellant's testimony that he never possessed a silver handgun was inconsistent with his conviction of a crime involving a small silver handgun the previous term. The Commonwealth asked the trial court's permission to cross-examine Appellant regarding that conviction. Defense counsel

opposed such cross-examination, advising the court that the charge was simple assault by physical menace, and that neither the criminal information nor the jury instruction asked the jury to find that Appellant used a weapon in the commission of the offense. He added that there was testimony of pushing and shoving that could have been the basis for the simple assault conviction.

The trial court agreed with defense counsel, but speculated aloud that the testimony opened the door if the Commonwealth could find a witness from the prior case who had seen Appellant with a silver handgun. *Id.* at 63. After a brief cross-examination of Appellant, a lunch recess was taken. After the jury's return at 1:30 p.m., the Commonwealth called Jason Parkin to the stand. Mr. Parkin testified that he was in Pawn Plus on July 21, 2011, and that he saw Appellant. He continued, "He had a pistol in his right hand. It was silver with it looked like black pistol grips, from what I saw of it." *Id.* at 73. He added that he was familiar with guns, and the gun was not large. *Id.* On cross-examination, Mr. Parkin iterated that he was "very sure" that this was a pistol in Appellant's hand and that there was no possibility that it was a cell phone. *Id.* at 74.

Appellant was subsequently convicted. Following an unsuccessful direct appeal, he filed this timely PCRA petition on June 17, 2013. Counsel was appointed, and he filed an amended petition on Appellant's behalf. The thrust of Appellant's claim is that trial counsel was ineffective in asking him

whether he had ever possessed a silver pistol. The Commonwealth filed a motion to dismiss the petition, which the PCRA court denied. An evidentiary hearing was held on October 22, 2013, at which Appellant offered the following testimony.

Appellant was represented at trial by court-appointed counsel, Joshua Neiderhiser. In preparation for trial, Appellant advised counsel that he wished to testify on his own behalf. N.T., PCRA Evidentiary Hearing, 10/22/13, at 6, 11. Counsel met with Appellant at the prison prior to trial, but according to Appellant, there was no discussion regarding the substance of his testimony, or whether he ever possessed a silver pistol. *Id.* at 7. Counsel, however, had previously represented Appellant on the charge of simple assault stemming from a threat at Pawn Plus on July 21, 2011, the day after the home invasion. *Id.* at 6. A witness testified at the simple assault trial that Appellant had displayed a silver pistol, but Appellant denied at that trial that he ever possessed such a gun, and maintained that he was holding a silver and black cell phone. The jury convicted Appellant of simple assault.

Appellant testified further on cross-examination that when the Commonwealth sought to introduce the rebuttal testimony of Mr. Parkin, he wanted counsel to object because he was unaware that the witness could be called at the second trial, and counsel did object. *Id.* at 12. There was no discussion at the time about whether counsel should seek a special

instruction. Appellant conceded that one of the allegations at the prior simple assault trial was that he had a silver pistol, although he denied it, and maintained that he was found guilty of simple assault because he shoved someone.

The PCRA court clarified with further questioning that Appellant denied possessing a silver handgun because that was the truth. N.T., PCRA Evidentiary Hearing, 10/22/13, at 13. Appellant confirmed that if the Commonwealth's attorney had asked him the same question, he would have truthfully answered the question the same way. *Id.* at 14. The PCRA court pointed out that there were "a number of witnesses" who testified that he had a silver handgun, and that he "chambered some rounds in it to actually show that it was loaded." *Id.* The court also inquired what type of limiting instruction he should have given, and PCRA counsel answered, "a general cautionary instruction" to the effect that the jury "should receive the evidence for the purpose of rebutting his statement on direct[,]" but that Appellant was not a bad person overall or one with violent propensities. *Id.* at 15.

On redirect examination, Appellant explained that he thought defense counsel's question, "Did you ever possess a silver pistol?" was limited to the date of the robbery. He admitted that he had possessed pistols on other occasions, but not on that occasion. Appellant maintained that, on July 21,

2010, what he had in his hand at Pawn Plus was a silver and black cell phone, not a firearm.

Attorney Joshua Neiderhiser testified that he represented Appellant at both the robbery trial and the prior simple assault trial. He confirmed that Appellant made the decision to testify against his advice. Counsel acknowledged that, during the simple assault trial, Appellant consistently denied having a firearm at Pawn Plus and maintained that it was a silver and black cell phone. *Id.* at 20. Counsel testified, however, that he anticipated Appellant would answer the question regarding the silver pistol in the affirmative, but then explain how that could appear similar to the black and silver cell phone he actually possessed on that occasion. He did not anticipate Appellant answering “no” to the question, or that the Commonwealth would call Mr. Parkin to refute that testimony. *Id.* at 23. Counsel objected to the Commonwealth’s witness, but he did not request a limiting instruction because he did not want to draw any more attention to the testimony that he possessed a silver pistol the next day.

The Commonwealth argued that if defense counsel had not asked the question, the Commonwealth would have, and thus, there was no prejudice. The PCRA court agreed and denied relief. Appellant timely appealed and complied with the court’s order to file a Pa.R.Crim.P. 1925(b) concise statement of errors complained of on appeal. His sole issue on appeal is:

1. Whether the PCRA court erred in denying the Petition for Post-Conviction Relief on the basis that the Appellant’s trial

counsel rendered constitutionally ineffective assistance of counsel by asking the Appellant on direct examination "Did you ever possess a silver pistol?" eliciting the Appellant's negative response and thereby opening the door for the Commonwealth to present rebuttal evidence that the Appellant possessed a silver pistol the very next day?

Appellant's brief at 3.

In reviewing PCRA appeals, we review the evidence "in the light most favorable to the prevailing party at the PCRA level." ***Commonwealth v. Henkel***, 90 A.3d 16, 20 (Pa.Super. 2014). Our "review is limited to the findings of the PCRA court and the evidence of record[.]" ***Id.*** Additionally, "[w]e grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record." ***Id.*** In this respect, we will not "disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error." ***Id.*** However, we afford no deference to its legal conclusions. ***Id.*** "[W]here the petitioner raises questions of law, our standard of review is *de novo* and our scope of review is plenary." ***Id.***

Appellant's sole issue implicates ineffective assistance of his trial counsel. We thoroughly discussed the law regarding an ineffectiveness claim in ***Commonwealth v. Stewart***, 84 A.3d 701 (Pa.Super. 2013) (*en banc*). In order to plead and prove ineffective assistance of counsel, the petitioner must establish that: (1) "the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." ***Id.*** at 706. "A claim

has arguable merit where the factual averments, if accurate, could establish cause for relief." *Id.* at 707.

In deciding whether counsel had a reasonable strategy for his action or inaction, the test is "whether no competent counsel would have chosen that action or inaction," or whether another alternative not chosen "offered a significantly greater potential chance of success." *Id.* Finally, "[p]rejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.* A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.*

Admittedly, trial counsel did not discuss Appellant's testimony with him prior to him taking the stand. Furthermore, the only strategic basis trial counsel offered for asking Appellant whether he had ever possessed a silver pistol was to give Appellant the opportunity to explain that he had been accused of possessing a silver pistol on the day after the home invasion, but that it was actually a silver and black cell phone, not a pistol. However, counsel should have anticipated that Appellant might answer the question in the negative, and that the Commonwealth would impeach him with the testimony of an eyewitness. That impeachment, in fact, did occur. Thus, we cannot find any reasonable basis for the course pursued by counsel.

The trial court concluded, however, that if defense counsel had not asked Appellant about his possession of a silver handgun, the Commonwealth inevitably would have. Once Appellant decided to take the

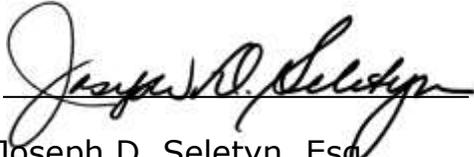
stand in his own defense, there was no obstacle to the Commonwealth asking him the identical question regarding the silver pistol. Moreover, Appellant represented to the PCRA court that if the Commonwealth had asked the same question, he would have testified truthfully and denied possession of the pistol, thus opening the door to Mr. Parkin's impeachment testimony. Hence, we agree with the PCRA court that Appellant could not demonstrate prejudice from counsel's ineffectiveness in eliciting this testimony.

Appellant argues, however, that if the Commonwealth had asked this question, it would not have opened the door to impermissible bad acts evidence about his possession of the handgun a day later. This Court previously rejected Appellant's contention that this was bad acts evidence. We held on direct appeal that evidence of Appellant's possession of a similar weapon close in time to the home invasion was highly probative and corroborative of the identification testimony of Commonwealth witnesses and admissible for that proper purpose. ***Alborran, supra*** at 13 (citing ***Commonwealth v. Hood***, 872 A.2d 175 (Pa.Super. 2005) ("evidence implying other crimes may be introduced when the evidence has a proper evidentiary purpose and is not used merely to demonstrate that the defendant is a person of bad character with a propensity to commit crime"); **see** Pa.R.E. 404(b)(1). Furthermore, in the instant case, the trial court limited the impeachment evidence to the fact that Appellant held a silver pistol in his hand at a pawnshop, and did not permit the Commonwealth to

introduce evidence that Appellant was convicted of simple assault based on that incident. This impeachment was proper, regardless of whether defense counsel or the Commonwealth elicited Appellant's denial that he possessed a silver pistol. Since Appellant could not satisfy the prejudice prong for ineffectiveness, the PCRA court properly denied him relief.

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: 12/23/2014