

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JOHN J. WARWICK

Appellant

No. 2209 MDA 2013

Appeal from the PCRA Order of November 13, 2013
In the Court of Common Pleas of Lackawanna County
Criminal Division at No.: CP-35-CR-0002394-2008

BEFORE: DONOHUE, J., WECHT, J., and STRASSBURGER, J.*

MEMORANDUM BY WECHT, J.:

FILED JULY 01, 2014

John Warwick appeals from the November 13, 2013 order dismissing his petition for relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541, *et seq.* PCRA counsel for Warwick has filed with this Court a petition to withdraw as counsel, together with an "**Anders** brief."¹ We

* Retired Senior Judge assigned to the Superior Court.

¹ **See *Anders v. California***, 386 U.S. 738, 744-45 (1967); ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009). Counsel apparently is operating under the mistaken belief that an **Anders/Santiago** brief is the proper mechanism to seek to withdraw as counsel on appeal from the denial of PCRA relief. In fact, the proper mechanism under such circumstances is the submission of a **Turner/Finley** brief. **See *Commonwealth v. Turner***, 544 A.2d 927, 928-29 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213, 214-15 (Pa. Super. 1988). However, because an **Anders** brief provides greater relative protection to a criminal appellant, we may accept such in lieu of a **Turner/Finley** brief. ***Commonwealth v. Widgins***, 29 A.3d 816, 817 n.2 (Pa. Super. 2011); (Footnote Continued Next Page)

affirm the order dismissing Warwick's PCRA petition, and we grant PCRA counsel's petition to withdraw.

In its opinion dismissing Warwick's instant petition, the PCRA court summarized the factual and procedural history of this case as follows:

On January 8, 2009, following a two[-]day jury trial over which [the PCRA court] presided, [Warwick] was convicted of driving under the influence of alcohol, offending 75 Pa.C.S. § 3802(a)(1). On June 4, 2009, the Honorable Michael Barrasse imposed [Warwick's] sentence.¹ Judge Barrasse sentenced [Warwick] to a prison term of twenty-one months to five years, plus an additional twelve to thirty-six months as a convicted probation violator. Thus, [Warwick] was sentenced in the aggregate to a total term of thirty-three months to eight years of incarceration. The underlying facts of [Warwick's] case are not complicated.

¹ While this Court presided at trial, it was Judge Barrasse who conducted sentencing.

On May 17, 2008, Officer Roland J. Alunni of the Olyphant Borough, PA Police Department ("Officer Alunni") was on patrol in the 500 block of South Valley Avenue in Olyphant, PA. Officer Alunni observed a gray Dodge pickup truck following too closely behind a traveling fire truck. The truck was en route to an ongoing structure blaze that was also occurring in the 500 block of South Valley Avenue in Olyphant, PA. As Officer Alunni observed, the gray Dodge pickup truck then failed to yield the right of way to additional emergency vehicles that were also traveling to the fire. Finally, Officer Alunni observed the gray Dodge pickup truck come to a complete stop in the middle of the road, and he observed its driver arguing with emergency responders who were at the scene of the fire. As he approached the parked vehicle, Officer Alunni was able to detect an odor of alcohol emanating from within the gray Dodge pickup truck.

(Footnote Continued) _____

Commonwealth v. Fusselman, 866 A.2d 1109, 1111 n.3 (Pa. Super. 2004).

Officer Alunni identified [Warwick] as the d[r]iver and sole occupant of the gray Dodge pickup truck. Suspecting [Warwick] was under the influence of alcohol, Officer Alunni asked him to exit the vehicle. Officer Alunni observed that [Warwick] was too impaired to stand or walk of his own strength and volition, so Officer Alunni physically held and guided [Warwick] into the rear compartment of his police cruiser. [Warwick] was transported to the Lackawanna County DUI Processing Center. There, [Warwick] refused field sobriety and blood alcohol testing.

As [Warwick] was on probation when he was arrested on May 17, 2008, [Warwick] was remanded to the Lackawanna County Prison. On October 3, 2008, the Lackawanna County District Attorney charged [Warwick], by Information, with one count of driving under the influence of alcohol. Following his conviction and sentencing, [Warwick] was transferred to a state correctional facility. On June 19, 2009, [Warwick] filed a [*pro se*] Petition under Pennsylvania's [PCRA] alleging ineffective assistance of trial counsel. On September 15, 2009, [Warwick] filed an "addendum" to his PCRA Petition, alleging prosecutorial misconduct. The Court appointed Attorney Kurt Lynott as PCRA counsel to [Warwick]. . . .

PCRA Court Opinion ("P.C.O."), 11/13/2013, at 1-3 (citations modified). On October 30, 2013, an evidentiary hearing was held on Warwick's PCRA petition. On November 13, 2013, the PCRA court filed an order dismissing Warwick's PCRA petition as meritless.

On December 3, 2013, Warwick filed a timely notice of appeal with this Court. The PCRA court did not direct Warwick to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Accordingly, Warwick did not file a Rule 1925(b) statement.

Warwick has raised two issues for our consideration: (1) whether trial counsel was ineffective for failing to call Warwick's son as a witness at trial; and (2) whether trial counsel was ineffective for failing to claim prosecutorial

misconduct due to the Commonwealth's alleged failure to provide exculpatory evidence to Warwick. **Anders** Brief for Warwick at 4. Our standard of review regarding a PCRA court's order is 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 those findings in the certified record. **Commonwealth v. Garcia**, 23 A.3d 1059, 1061 (Pa. Super. 2011) (citing **Commonwealth v. Smith**, 995 A.2d 1143, 1149 (Pa. 2010)).

Because this is an appeal from a PCRA order, we will treat PCRA counsel's **Anders** brief as a **Turner/Finley** brief. **See supra** 1 n.1. We first consider whether PCRA counsel has complied with the technical requirements that our courts have established before appointed counsel may be released.

Counsel petitioning to withdraw from PCRA representation must proceed under [**Turner/Finley** and] . . . must review the case zealously. **Turner/Finley** counsel must then 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 petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Counsel must also send to the petitioner: (1) a copy of the "no merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed *pro se* or by new counsel.

Where counsel submits a petition and no-merit letter that satisfy the technical demands of **Turner/Finley**, the court – trial court or this Court – must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are

without merit, the court will permit counsel to withdraw and deny relief.

Commonwealth v. Doty, 48 A.3d 451, 454 (Pa. Super. 2012) (citations omitted).

We conclude that PCRA counsel has complied substantially with the technical requirements of ***Turner/Finley***. In his brief, PCRA counsel sets forth the two claims that Warwick sought to raise before this Court. ***Anders*** Brief for Warwick at 4. PCRA counsel also provides a brief recitation of the procedural and factual background of the case. ***Id.*** at 5-6. After review, PCRA counsel could not glean anything from the record that he believed supported Warwick's petition. Specifically, PCRA counsel concluded that "[t]rial [c]ounsel made a strategic decision not to call [Warwick's] son as the testimony would have been more harmful than helpful" and that the allegedly undisclosed exculpatory evidence did not exist. ***Id.*** at 6. Thus, PCRA counsel concluded that Warwick was not eligible for relief. ***Id.*** at 7.

This Court has received a copy of the March 10, 2014 letter that PCRA counsel sent to Warwick explaining his belief that Warwick's appeal lacks merit. Moreover, the letter advised Warwick that he was permitted to proceed *pro se*, that he was permitted to retain private counsel to pursue the appeal, and that the failure to raise any additional claims with this Court would result in a waiver. On March 17, 2014, Warwick filed a response indicating that he would like to proceed *pro se*. In addition to the claims enumerated by PCRA counsel, Warwick argued in his March 17, 2014

response letter that an allegedly self-incriminating and prejudicial edited audio recording of himself was introduced to the jury in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966). **See** Warwick's Letter to Prothonotary, 3/17/2014, at 2 (unnumbered). PCRA counsel did not file an application to withdraw along with his brief. Pursuant to a March 18, 2014 order, this Court directed PCRA counsel to file a petition to withdraw and to serve Warwick with a copy of the same. On March 21, 2014, PCRA counsel submitted a copy of his petition to withdraw to this Court and to Warwick. The petition was filed of record on March 31, 2014. Thus, we conclude that PCRA counsel has complied with our March 18, 2014 order.

Based upon the foregoing discussion, we conclude that PCRA counsel has complied substantially with the ***Turner/Finley*** requirements. **See Doty**, 48 A.3d at 454. However, before passing upon PCRA counsel's petition to withdraw, we must conduct an independent review of the entire record.

In his brief before this Court, PCRA counsel concluded that both of Warwick's ineffective assistance of counsel ("IAC") claims lack merit. To be eligible for relief for IAC, Warwick must prove by a preponderance of the evidence that the alleged ineffectiveness "so undermined the truth-determining process that no reasonable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii).

We begin with the presumption that counsel rendered effective assistance. ***Commonwealth v. Basemore***, 744 A.2d 717, 728 n.10 (Pa. 2000). To obtain relief on a claim of ineffective

assistance of counsel, a petitioner must rebut that presumption and demonstrate that counsel's performance was deficient, and that such performance prejudiced him. **Strickland v. Washington**, 466 U.S. 668, 687-91 (1984). In our Commonwealth, we have rearticulated the **Strickland** Court's performance and prejudice inquiry as a three-prong test. Specifically, a petitioner must show: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. **Commonwealth v. Pierce**, 527 A.2d 973, 975 (Pa. 1987).

Commonwealth v. Dennis, 17 A.3d 297, 301 (Pa. 2011) (citations modified). "If an appellant fails to prove by a preponderance of the evidence any of the **Pierce** prongs, the Court need not address the remaining prongs of the test." **Commonwealth v. Fitzgerald**, 979 A.2d 908, 911 (Pa. Super. 2009) (boldface added). We need not analyze "the elements of an ineffectiveness claim in any particular order of priority; instead, if a claim fails under any necessary element of the [**Pierce**] test, the court may proceed to that element first." **Commonwealth v. Lambert**, 797 A.2d 232, 243 n.9 (Pa. 2001). Furthermore, "counsel will not be considered ineffective for failing to pursue meritless claims." **Commonwealth v. Pursell**, 724 A.2d 293, 304 (Pa. 1999) (citing **Commonwealth v. Parker**, 469 A.2d 582, 584 (Pa. 1983)).

Warwick first argues that trial counsel was ineffective for failing to call Warwick's son as a witness at trial. We disagree. The legal standards attendant to an IAC claim, based upon an alleged failure to call a witness, are well established:

When raising a claim of ineffectiveness for the failure to call a potential witness, a petitioner satisfies the performance and prejudice requirements of the **Strickland** test by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (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 of the witness was so prejudicial as to have denied the defendant a fair trial. **Commonwealth v. Johnson**, 966 A.2d 523, 536 (Pa. 2009); **Commonwealth v. Clark**, 961 A.2d 80, 90 (Pa. 2008). To demonstrate **Strickland** prejudice, a petitioner “must show how the uncalled witnesses’ testimony would have been beneficial under the circumstances of the case.” **Commonwealth v. Gibson**, 951 A.2d 1110, 1134 (Pa. 2008). Thus, counsel will not be found ineffective for failing to call a witness unless the petitioner can show that the witness’ testimony would have been helpful to the defense. **Commonwealth v. Auker**, 681 A.2d 1305, 1319 (Pa. 1996). “A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy.” **Id.**

Commonwealth v. Sneed, 45 A.3d 1096, 1108-09 (Pa. 2012) (citations modified).

Instantly, Warwick has identified a witness that was available to testify at his trial, whose existence was known to trial counsel. **Anders** Brief for Warwick at 5-6. Furthermore, the witness was willing to testify for the defense. **See** Warwick’s Letter to Prothonotary at 5 (unnumbered). However, trial counsel testified that there was little to be gained from this testimony, because the witness would have corroborated the Commonwealth’s argument that Warwick had consumed alcoholic beverages before operating a motor vehicle. **See** Notes of Testimony—PCRA (“N.T. PCRA”), 10/29/2013, at 44-45. Specifically, Warwick’s son would have

testified that Warwick had only consumed a few alcoholic beverages on the night in question, and was not especially intoxicated. **See** Warwick's Letter to Prothonotary at 5 (unnumbered). Furthermore, trial counsel testified that the witness was not credible due to "possibly being under the influence of alcohol [himself] at the time of [Warwick's] arrest." N.T. PCRA at 44-45. Based upon the facts of record and the testimony from trial counsel, there is no indication that the witness' testimony ultimately would have been helpful to the defense. **See Auker**, 681 A.2d at 1319. Rather, the testimony would have served to bolster the Commonwealth's case against Warwick. Accordingly, Warwick has not demonstrated the requisite **Strickland** prejudice. **See Gibson**, 951 A.2d at 1134. Thus, Warwick's first IAC claim is without merit.

Warwick next argues that "[t]rial [c]ounsel was ineffective for failing to claim prosecutorial misconduct due to [the] Commonwealth's failure to provide exculpatory evidence to [Warwick]." ² **Anders** Brief for Warwick at 4. We disagree.

Warwick posits that "a video tape of the hallway outside the Lackawanna County Booking Center [establishing Warwick's sobriety] was withheld by the Commonwealth." **Anders** Brief for Warwick at 5.

² The PCRA court analyzed this claim as raising a prosecutorial misconduct issue. **See** P.C.O. at 7-9. However, because Warwick frames this claim as an IAC issue, we analyze it as such.

Testimony at the PCRA hearing indicates that this putative video does not exist. Warwick testified that he is unsure as to whether the booking center hallway is actually recorded by video camera. N.T. PCRA at 20. Warwick's trial counsel testified that he cannot recall Warwick requesting the particular hallway video at issue, and that he had obtained "all [of] the evidence that the Commonwealth ha[d]." **Id.** at 45. Furthermore, the prosecuting attorney testified that he was not aware of the existence of any such video. **Id.** at 65. Although the prosecuting attorney further testified that while the processing room at the booking center is under audio and video surveillance, **id.** at 66, there is no evidence of record confirming that the hallway in question is similarly monitored. There is nothing in the evidence of record to establish that the video sought by Warwick actually exists. Consequently, Warwick has failed to establish the arguable merit of this claim. Warwick's trial counsel cannot be ineffective for failing to pursue a meritless claim. **See Pursell**, 724 A.2d at 304 (citing **Parker**, 469 A.2d at 584). Thus, Warwick's second IAC claim is without merit.

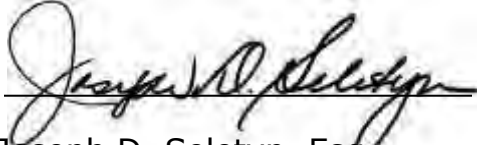
In addition to the claims enumerated by PCRA counsel, Warwick argues in his March 17, 2014 letter to the Prothonotary that an allegedly self-incriminating and prejudicial edited audio recording of himself was introduced to the jury in violation of **Miranda v. Arizona**, 384 U.S. 436 (1966). **See** Warwick's Letter to Prothonotary at 2 (unnumbered). Because defense counsel introduced this recording to the jury, we assume that Warwick refers to the IAC claim first raised in his PCRA petition. **See**

Warwick's PCRA Petition, 6/19/2009, at 1 (unnumbered). Warwick alleges that "ineffective assistance of counsel . . . [in introducing a self-incriminating and prejudicial edited audio/video recording of Warwick] undermin[ed] the truth determining process [so] that no reliable of adjudication of guilt or innocence could [have] taken place." **Id.** We note that Warwick does not cite the **Pierce** standard for IAC claims, nor does he provide discrete arguments as to each prong of the **Pierce** test. Rather, his letter to the Prothonotary presents an undifferentiated assertion that counsel's alleged error prejudiced him before the jury. Such undeveloped claims, based upon bald allegations and boilerplate language, cannot satisfy Warwick's burden of proof. Warwick must set forth and individually discuss, in substance, each prong of the **Pierce** test. **Commonwealth v. Steele**, 961 A.2d 786, 797 (Pa. 2008). When an appellant fails to do so, the IAC issue is "waived for lack of development." **Id.** Because Warwick has failed to set forth and individually discuss each prong of the **Pierce** test, we conclude that this issue is waived for lack of development. **Id.**

The record supports the PCRA court's determination that Warwick's petition is without merit. Because the trial court's determination is free of error, we agree with PCRA counsel that Warwick's claims are frivolous. Furthermore, our independent review of the certified record has uncovered no additional meritorious issues. Thus, we grant PCRA counsel's application to withdraw, and we affirm the order of the PCRA court.

Application to withdraw granted. 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: 7/1/2014