NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CAMERON ARTHUR HARINARAIN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3062 EDA 2013

Appeal from the PCRA Order October 17, 2013
in the Court of Common Pleas of Pike County
Criminal Division at No.: CP-52-CR-0000297-2007

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.: **FILED JUNE 04, 2014**

Appellant, Cameron Arthur Harinarain, appeals *pro se* from the denial of his first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, after a hearing. We affirm.

On August 23, 2007, Appellant and two other individuals broke into the home of Barry Rose, a retired corrections officer, where they shot and killed him. The purpose of the break-in was to steal handguns owned by Mr. Rose. Counsel conducted *voir dire* and the court empaneled the jury on Friday, March 6, 2009. On Monday, March 9, 2009, immediately before opening statements commenced, Appellant's trial counsel joined co-

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* Retired Senior Judge assigned to the Superior Court.

defendant's attorney's ***Batson***[1] challenge alleging racial discrimination by the Commonwealth during jury selection. (***See*** N.T. Trial, 3/09/09, at 11-12). Counsel claimed that excluding "the only black male on the jury panel" constituted a *prima facie* showing of discrimination. (***Id.*** at 11; ***see id.*** at 12). The court disagreed and denied the motion. (***See id.*** at 12-13).

On March 18, 2009, the jury convicted Appellant of second degree murder, two counts each of robbery and conspiracy, and one count each of burglary and firearms not to be carried without a license.[2] On March 19, 2009, the trial court sentenced Appellant to an aggregate term of mandatory life in prison plus a consecutive term of not less than fourteen nor more than thirty-four years.

The court denied Appellant's post-sentence motions and this Court affirmed his judgment of sentence on February 2, 2011. (***See Commonwealth v. Harinarain***, 24 A.3d 443 (Pa. Super. 2011) (unpublished memorandum)). In relevant part, this Court concluded that Appellant's ***Batson*** challenge was waived for counsel's failure to raise it during *voir dire*. (***See Commonwealth v. Harinarain***, No. 1422 EDA 2009, unpublished memorandum, at *10-11, (Pa. Super. Feb. 2, 2011)).

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[1] ***Batson v. Kentucky***, 476 U.S. 79, 89 (1986).

[2] 18 Pa.C.S.A. §§ 2502(b), 3701(a)(1)(i) and (ii), 903(a)(1) and (c), 3502(a), and 6106(a)(1), respectively.

Our Supreme Court denied Appellant's petition for allowance of appeal on September 14, 2011. (***See Commonwealth v. Harinarain***, 29 A.3d 371 (Pa. 2011)).

On June 4, 2012, Appellant filed a timely *pro se* PCRA petition. Appointed counsel filed a ***Turner***/***Finley***[3] no-merit letter on August 13, 2012. On August 20, 2012, the court granted counsel's request to withdraw and issued a Rule 907 notice of its intent to dismiss Appellant's petition without a hearing. ***See*** Pa.R.Crim.P. 907(1). Appellant responded to the Rule 907 notice and, on September 12, 2012, the PCRA court scheduled a hearing. On January 24, 2013, Appellant filed a supplemental PCRA document, which the court took under advisement as a further response to

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[3] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

counsel's motion to withdraw.[4] After a hearing, the court denied Appellant's petition. Appellant timely appealed.[5]

Appellant raises six issues for our review:

> 1). Whether trial counsel rendered ineffective [assistance] for failing to properly preserve [Appellant's] ***Batson*** [c]laims?
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> 2). Whether trial counsel rendered ineffective [assistance] for failing to object to the admittance into evidence of [C]ommonwealth Exhibit # 57?
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> 3). Whether trial counsel rendered ineffective assistance of counsel for failing to call Anthony Collichio as a witness at the suppression hearing[?] Whether the evidence was sufficient to sustain the conviction without [Appellant's] statement?[]
>
> 4). Whether [the PCRA] court erred in granting [Appellant] an evidentiary hearing without the presence or representation of counsel?[]
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> 5). Whether [PCRA] counsel rendered ineffective assistance of counsel for filing a no[-]merit/***Finley*** [letter]?[]
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> 6). [Appellant] in this present matter, just turned eighteen (18) on August 12, 2007 right before the crime was judged to have occured [sic] on August 24, 2007 and his concern and the

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[4] Generally, "[w]here the petitioner does not seek leave to amend his petition after counsel has filed a ***Turner***/***Finley*** no-merit letter, the PCRA court is under no obligation to address new issues." ***Commonwealth v. Rigg***, 84 A.3d 1080, 1085 (Pa. Super. 2014) (citation omitted). However, this Court has concluded that "the PCRA court's actions [in considering the supplemental document] were well within its discretion and were in furtherance of achieving substantial justice for a PCRA petitioner who was proceeding *pro se*." ***Commonwealth v. Boyd***, 835 A.2d 812, 816 (Pa. Super. 2003).

[5] Pursuant to the court's order, Appellant filed a timely statement of errors on November 21, 2013. ***See*** Pa.R.A.P. 1925(b). The court filed a Rule 1925(a) opinion on January 2, 2014. ***See*** Pa.R.A.P. 1925(a).

> concern of all Pe[n]nsylvania citizens who are protect[t]ors of Pennsylvania's [C]onstitution is whether the classism that was established by Article V. Section 16, under Juveniles, makes the reference to those under eighteen (18) years of age, and to minors 18-20 years of age, the standard in Pennsylvania[?]

(Appellant's Brief, at 3).

Our standard of review for an order denying PCRA relief is well-settled:

> This Court analyzes PCRA "appeals in the light most favorable to the prevailing party at the PCRA level." ***Commonwealth v. Rykard***, 55 A.3d 1177, 1183 (Pa. Super. 2012[, *appeal denied*, 64 A.3d 631 (Pa. 2013)]. Our "review is limited to the findings of the PCRA court and the evidence of record" and we do not "disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error." ***Id.*** Similarly, "[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. However, we afford no such deference to its legal conclusions." ***Id.*** (citations omitted). "[W]here the petitioner raises questions of law, our standard of review is *de novo* and our scope of review is plenary. . . . ." ***Id.***

Rigg, ***supra*** at 1084.

Initially, we will address the ineffective assistance of counsel allegations raised in Appellant's first, second, third, and fifth arguments. (***See*** Appellant's Brief, at 6-16, 20-23).

To obtain relief on a claim for ineffective assistance of counsel, Appellant must establish: "(1) that 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." ***Rykard***, ***supra*** at 1189-90 (citation omitted). "A failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness."

Commonwealth v. Daniels, 963 A.2d 409, 419 (Pa. 2009) (citation omitted).[6]

In Appellant's first issue, he argues that "[t]rial counsel rendered ineffective assistance . . . for failing to properly preserve [his] ***Batson*** [c]hallenge." (Appellant's Brief, at 6). This argument does not merit relief.

Pursuant to ***Batson***, ***supra***, "the Equal Protection Clause forbids [a] prosecutor [from] challeng[ing] potential jurors solely on account of their race." ***Batson***, ***supra*** at 89. Our Supreme Court set forth the framework for analyzing a ***Batson*** claim, as follows:

> ***Batson*** set forth a three-part test for examining a criminal defendant's claim that a prosecutor exercised peremptory challenges in a racially discriminatory manner. First, the defendant must make a *prima facie* showing that the circumstances give rise to an inference that the prosecutor struck one or more prospective jurors on account of race. Second, if the *prima facie* showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror(s) at issue. Third, the trial court must then make the ultimate determination of whether the defense has carried its burden of proving purposeful discrimination.

Commonwealth v. Ligons, 971 A.2d 1125, 1142 (Pa. 2009) (citations omitted).

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[6] In this case, after erroneously citing ***Strickland v. Washington***, 466 U.S. 668 (1984), for the three-prong ineffectiveness test, Appellant fails expressly to argue each prong's applicability to this case with pertinent discussion and citations. (***See*** Appellant's Brief, at 6-16, 20-23); ***see also*** Pa.R.A.P. 2119(a)-(c). However, to the extent that we can discern the bases of Appellant's complaints, we will discuss their merits.

However, when examining a claim of counsel's ineffectiveness for failing to make a ***Batson*** challenge at *voir dire*, our Supreme Court observed:

> in a case . . . where trial counsel did not lodge a contemporaneous ***Batson*** objection during *voir dire,* Appellant is not entitled to the benefit of ***Batson***'s burden-shifting formula and must demonstrate actual purposeful discrimination by a preponderance of the evidence. [Where] [t]he only evidence proffered that relates to the empanelling of Appellant's particular jury is the fact that the prosecutor peremptorily struck more African Americans than Caucasians[,] [t]his fact, absent any other evidence of discrimination, is insufficient to demonstrate purposeful discrimination.

Commonwealth v. Hanible, 30 A.3d 426, 478 (Pa. 2011), *cert. denied*, 133 S. Ct. 835 (2013) (citations omitted).

In this case, it is undisputed that counsel's ***Batson*** challenge was untimely. (***See*** Appellant's Brief, at 7; Commonwealth's Brief, at 8). However, the record belies Appellant's argument that he was prejudiced because, notwithstanding counsel's procedural error, the court denied his motion on its merits. (***See*** Appellant's Brief, at 7-8). Specifically, in spite of the challenge's lateness, the court held a ***Batson*** hearing at which Appellant failed to provide any evidence to support his claim. (***See*** PCRA Court Opinion, 1/02/14, at 5; ***see also*** N.T. Trial, 3/09/09, at 8-14). Based on this evidentiary failure, the court denied Appellant's claim on the basis that

he had failed to establish a *prima facie* case of purposeful discrimination. (***See*** PCRA Ct. Op., at 5; ***see also*** N.T. Trial, 3/09/09, at 12-13).[7]

Therefore, Appellant cannot establish prejudice where, even though counsel raised an untimely ***Batson*** challenge, the trial court held a ***Batson*** hearing and denied the claim. (***See*** PCRA Ct. Op., at 5; ***see also*** N.T., 3/09/09, at 12-13). Hence, the issue is moot and the PCRA court properly found that Appellant failed to establish ineffectiveness of trial counsel. (***See*** PCRA Ct. Op., at 5); ***see also Daniels***, ***supra*** at 419; ***Rigg***, ***supra*** at 1084; ***Rykard***, ***supra*** at 1089-90. Appellant's first issue fails.

In Appellant's second claim, he argues that "[t]rial counsel rendered ineffective [assistance] for failing to object to the admittance into evidence of [C]ommonwealth Exhibit [number] 57." (Appellant's Brief, at 8). This claim does not merit relief.

Appellant provides absolutely no pertinent citation or discussion to support his claim that the PCRA court erred in concluding that counsel was not ineffective for failing to object to the admission of exhibit number 57. ***See*** Pa.R.A.P. 2119(a)-(b); (***see also*** Appellant's Brief, at 8-9; PCRA Ct.

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[7] Although not the basis of the court's decision, we also observe that, in order to show "a non-prejudicial reason for making a strike," the Commonwealth presented the potential juror's questionnaire in which the individual noted that he "[w]ould . . . be less likely to believe the testimony of a police officer or other law enforcement officer because of his or her job[.]" (N.T. Trial, 3/09/09, at 1; ***Batson*** Exhibit 2, Juror Information Questionnaire, at 1 ¶ 9, 4).

Op., at 6). He also fails to provide references to the record evidencing the gun's admission. (***See*** Appellant's Brief, at 8-9); ***see also*** Pa.R.A.P. 2119(c). Accordingly, this issue is waived. Moreover, it would not merit relief.

Specifically, although Appellant argues that the he was prejudiced by the admission of the silver hand-gun, (***see*** Appellant's Brief, at 8), he has utterly failed to establish that, had counsel objected to it, the evidence would have been precluded. ***See Rykard, supra*** at 1189-90.

In fact, the PCRA court observes:

> As shown by the testimony at trial, the Appellant and his Co-Defendants had several guns in their possession during the commission of the crime, one of which was silver. One of the Defendant went through the Pine Ridge area after committing the crime. Exhibit #57 was found in the Pine Ridge area after the crime and it was silver. H.T. on 3/11/09, pg. 133-135.
>
> Appellant failed to provide any evidence that the Commonwealth misrepresented this evidence, presented false testimony or the like that would have provided a basis for his trial counsel to assert a valid, sustainable objection to Exhibit #57. The evidence was . . . admitted at trial and was probative as circumstantial proof of the connection between Appellant and his Co-Defendants.

(PCRA Ct. Op., at 6).

Based on our independent review of the record, we agree with the court and conclude that it properly acted within its broad discretion when it admitted the gun into evidence. ***See Commonwealth v. Huggins***, 68 A.3d 962, 966 (Pa. Super. 2013), *appeal denied*, 80 A.3d 775 (Pa. 2013) ("A trial court has broad discretion to determine whether evidence is admissible[.]")

(citation omitted). Therefore, an objection by counsel would have lacked merit and, therefore, Appellant has failed to prove that counsel rendered ineffective assistance when he failed to object to the court's proper admission of the gun at trial. ***See Rigg***, ***supra*** at 1084. Hence, even if not waived, Appellant's claim would lack merit.

In Appellant's third claim, he argues that "[t]rial counsel rendered ineffective assistance . . . for failing to call Anthony Callichio as a witness at the suppression hearing." (Appellant's Brief, at 10).[8] This claim lacks merit.

We have long held that:

> To prevail on a claim of ineffectiveness for failure to call a witness, the [petitioner] must demonstrate that: (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness' existence; (4) the witness was prepared to cooperate and would have testified on [the petitioner's] behalf; and (5) the absence of the testimony prejudiced [the petitioner].

Commonwealth v. Hammond, 953 A.2d 544, 556 (Pa. Super. 2008), *appeal denied*, 964 A.2d 894 (Pa. 2009) (citation omitted).

In this case, assuming *arguendo* that Appellant has established that the proposed witness exists, he has utterly failed to prove any of the remaining prongs. (***See*** Appellant's Brief, at 10-11); ***see also Hammond***,

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[8] Appellant also raises an issue regarding the sufficiency of the evidence to support his conviction. (***See*** Appellant's Brief, at 10). A sufficiency of the evidence challenge is not the proper subject of a PCRA petition. ***See*** 42 Pa.C.S.A. § 9543(a)(2). Additionally, even if it were the proper subject of a PCRA challenge, it would be waived for Appellant's failure to raise it in his direct appeal. ***See*** 42 Pa.C.S.A. § 9544(b).

supra at 556. Accordingly, this issue lacks merit. ***See Daniels***, ***supra*** at 419; ***Rigg***, ***supra*** at 1084; ***Rykard***, ***supra*** at 1089-90.

In his fifth claim, Appellant argues that PCRA counsel was ineffective for filing a ***Turner***/***Finley*** no-merit letter. (***See*** Appellant's Brief, at 20-23). This claim is waived for Appellant's failure to raise it in the PCRA court.

"[W]hen counsel files a ***Turner***/***Finley*** no-merit letter to the PCRA court, a petitioner must allege any claims of ineffectiveness of PCRA counsel in a response to the court's notice of intent to dismiss. . . . [C]laims of PCRA counsel ineffectiveness cannot be raised for the first time after a notice of appeal has been taken from the underlying PCRA matter." ***Commonwealth v. Ford***, 44 A.3d 1190, 1998, 1201 (Pa. Super. 2012), *appeal denied*, 54 A.3d 349 (Pa. 2012) (footnote omitted); ***see also Rigg***, ***supra*** at 1084-85 (concluding that claim of PCRA counsel ineffectiveness waived where appellant did not include it in his response to Rule 907 notice).

In his responses to the Rule 907 notice, Appellant did not allege that counsel was ineffective for filing a ***Turner***/***Finley*** no-merit letter. (Response to Court Order, 9/07/12, at 1-2; "Amended, Extended, Continued Attachment to Previously Filed [PCRA] Petition," 1/24/13, at 1-4). Accordingly, because Appellant raised this ineffectiveness of PCRA counsel claim for the first time in his Rule 1925(b) statement, (***see*** Concise

Statement of [Errors] Complained of On Appeal, 11/21/13, at 2 ¶ 4), it is waived. ***See Rigg***, ***supra*** at 1084-85.[9]

Having reviewed Appellant's ineffective assistance of counsel claims, we turn now to his fourth and sixth issues.

In his fourth issue, Appellant claims that the PCRA court erred in granting counsel's motion to withdraw and thereafter conducting a PCRA hearing wherein Appellant "was forced to represent himself[.]" (Appellant's Brief, at 17). This issue lacks merit.

It has long been the law of this Commonwealth that:

> . . . . when counsel has been appointed to represent a petitioner in post-conviction proceedings as a matter of right under the

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[9] Moreover, even if it were not waived for Appellant's failure to preserve it in the PCRA court, Appellant's issue would lack merit. ***See Commonwealth v. Glover***, 738 A.2d 460, 463 (Pa. Super. 1999) ("[C]ounsel may withdraw at any stage of collateral proceedings if, in the exercise of his or her professional judgment, counsel determines that the issues raised in those proceedings are meritless and if the post-conviction court concurs with counsel's assessment.") (citations omitted).

In this case, appointed PCRA counsel attached a thorough ***Turner***/***Finley*** letter to his motion to withdraw in which he detailed the extent of his review and specifically explained why each of Appellant's issues lacked merit. (***See*** Motion to Withdraw as PCRA Counsel, 8/13/12, at 1-2; ***see id.*** at Attachment, ***Turner***/***Finley*** Letter, 8/13/12, at 1-17). The PCRA court, after conducting its own independent review, agreed that none of Appellant's issues merited relief. (***See*** PCRA Ct. Op., at 1).

Accordingly, we conclude that the PCRA court did not err when it determined that counsel was not ineffective for filing a ***Turner***/***Finley*** letter. (***See id.*** at 8); ***see also Daniels***, ***supra*** at 419; ***Rigg***, ***supra*** at 1084-85; ***Rykard***, ***supra*** at 1089-90; ***Glover***, ***supra*** at 463.

> rules of criminal procedure and when that right has been fully vindicated by counsel being permitted to withdraw under the procedure authorized in ***Turner***[/***Finley***], **new counsel shall not be appointed** and the petitioner . . . must thereafter look to his or her own resources for whatever further proceedings there might be.

Commonwealth v. Maple, 559 A.2d 953, 956 (Pa. Super. 1989) (footnote omitted and emphasis added); ***see also Rykard***, ***supra*** at 1183 n.1 (same); ***Glover***, ***supra*** at 463 (holding that after appointed PCRA counsel is granted permission to withdraw on the basis of ***Turner***/***Finley***, "the post-conviction petitioner then may proceed *pro se,* by privately retained counsel, or not at all.").

In this case, based on counsel's detailed ***Turner***/***Finley*** letter and its own independent review, the court allowed counsel to withdraw. (***See*** Order, 8/20/13, at 1; PCRA Ct. Op., at 1; ***see also*** Motion to Withdraw as PCRA Counsel, 8/13/12, at 1-2, Attachment, ***Turner***/***Finley*** Letter, 8/13/12, at 1-17). The court advised Appellant that, if he chose to pursue the PCRA claims, he could do so either *pro se* or by retaining new counsel. (***See*** Order, 8/20/13, at 1); ***see also Maple***, ***supra*** at 956; ***Rykard***, ***supra*** at 1183 n.1 (same); ***Glover***, ***supra*** at 463. Appellant elected to proceed with his PCRA petition *pro se*. (***See*** Appellant's Response to Court Order, 9/07/12, at 1-2; "Amended, Extended, Continued Attachment to Previously Filed [PCRA] Petition," 1/24/13; Response to Court Ordered Hearing and Required Brief to be Submitted, 7/29/13).

Based on the foregoing, we conclude that the court properly conducted Appellant's PCRA hearing without appointing new counsel for him. ***See Maple***, ***supra*** at 956; ***see also Rykard***, ***supra*** at 1183 n.1; ***Glover***, ***supra*** at 463. Appellant's fourth issue lacks merit.

In his sixth issue, Appellant argues that his "equal protection right[] was violated by receiving a mandatory life sentence when he was a juvenile." (Appellant's Brief, at 24). Specifically, Appellant argues that his sentence violates the holding of ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), which should be applied retroactively. (***See id.*** at 24-25). This issue lacks merit.

In ***Miller***, the Supreme Court of the United States held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" ***Miller***, ***supra*** at 2460. Here, Appellant admits that he was eighteen years old at the time that he committed the subject murder. (***See*** Appellant's Brief, at 7). Accordingly, because Appellant was not under the age of eighteen at the time he committed the relevant crime, the holding of ***Miller*** does not apply to his circumstances.[10] ***See Miller***, ***supra*** at 2460.

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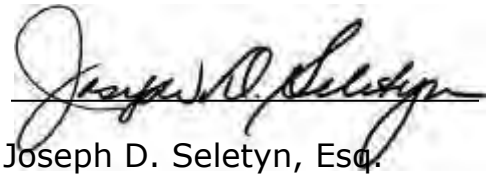
[10] Moreover, our Supreme Court has concluded that ***Miller*** does not apply retroactively to a PCRA petitioner. ***See Commonwealth v. Cunningham***, *(Footnote Continued Next Page)*

Therefore, the certified record supports the PCRA court's finding that Appellant's argument regarding ***Miller***, ***supra*** lacks arguable merit. (***See*** PCRA Ct. Op., at 10). Appellant's sixth issue fails. ***See Rigg***, ***supra*** at 1084. Hence, we affirm the PCRA court's order denying Appellant's PCRA petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/4/2014

(Footnote Continued) ———————————

81 A.3d 1, 7 (Pa. 2013), *petition for cert. filed*, 82 USLW 3555 (Feb. 26, 2014).