NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
CHARLES M. SELBY,	:	
	:	
Appellant	:	No. 3245 EDA 2013

Appeal from the PCRA Order October 22, 2013
In the Court of Common Pleas of Delaware County
Criminal Division No(s).: CP-23-CR-0004009-2008

BEFORE: BENDER, P.J.E., SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JUNE 26, 2014**

Appellant, Charles M. Selby, appeals from the order entered in the Delaware County Court of Common Pleas that denied, without an evidentiary hearing, his first petition filed under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Appellant claims that the PCRA court erred by failing to conduct an evidentiary hearing. We are constrained to affirm.

The factual history underlying Appellant's conviction is well known to the parties, has been set forth in the PCRA court's opinion,[1] and need not be restated here. The relevant procedural history is as follows. Appellant was

* Former Justice specially assigned to the Superior Court.

[1] PCRA Ct. Op., 1/2/14, at 2-8.

arrested on May 7, 2008, after Pennsylvania State Troopers, through a confidential informant, arranged for a controlled purchase of marijuana and cocaine and then stopped Appellant's vehicle under the pretext of a traffic violation. After discovering marijuana and cocaine inside Appellant's vehicle, the troopers obtained a search warrant for an apartment believed to be the location where Appellant stored controlled substances. The troopers executed the warrant and discovered various controlled substances, paraphernalia, and a handgun.

Appellant, through trial counsel, Timothy Possenti, Esq., filed pretrial motions on August 15, 2008, seeking the suppression of all evidence discovered in the vehicle and the apartment. Specifically, Appellant asserted that the "stopping of [his vehicle] was made without probable cause," and that the search warrant for the apartment "did not establish probable cause." Appellant's Omnibus Pretrial Mot., 8/15/08, at 1-2. The trial court, with Judge William R. Toal presiding, conducted a suppression hearing on August 17, 2009. At the conclusion of the hearing, the court noted, "I have discussed with counsel at sidebar the decision in this matter and the possibility of trying this case." N.T., 8/15/09, at 114. The court, however, continued the case until September 14, 2009, and permitted trial counsel to submit additional arguments in support of the suppression motions. ***Id.***

The certified record thereafter contains no indication that trial counsel submitted additional arguments after the suppression hearing, although the

Commonwealth, on August 27, 2009, filed a memorandum of law in opposition to the suppression motions. Of significance to the present appeal, the record does not contain any findings of fact, conclusions of law, or order disposing of the suppression motions. ***See*** Pa.R.Crim.P. 581(I).

Instead, on September 14, 2009, the trial court called the case for trial, at which time the parties selected a jury. On September 16, 2009, the parties litigated motions in *limine*. The Commonwealth then presented its evidence to the jury, including the evidence that had been the subject of Appellant's suppression motions. Appellant, on September 17, 2009, waived his right to testify following a colloquy and the defense presented no evidence. The jury, that same day, found Appellant guilty of all offenses and rendered a specific finding that Appellant possessed the handgun discovered in the apartment.

The trial court, on December 8, 2010, sentenced Appellant to an aggregate thirteen to twenty-six years' imprisonment. Appellant's post-sentencing counsel, Richard C. Daubenberger, Esq., timely filed a post-sentence motion challenging the weight of the evidence. Consideration of the motion was assigned to Judge Barry C. Dozor, who denied post-sentence relief on March 29, 2010.

Appellant took a direct appeal to this Court challenging the sufficiency and weight of the evidence. This Court affirmed the judgment of sentence on January 31, 2011, and the Pennsylvania Supreme Court denied allowance

of appeal on November 1, 2011. ***Commonwealth v. Selby***, 882 EDA 2010 (unpublished memorandum) (Pa. Super. Jan. 31, 2011), *appeal denied*, 160 MAL 2011 (Pa. Nov. 1, 2011).

Appellant filed the *pro se* PCRA petition giving rise to this appeal on October 26, 2012. The PCRA court, with Judge James P. Bradley presiding, appointed present counsel, who, in turn, filed an amended petition on September 26, 2013. The amended petition set forth the following claim: "The issue of ineffectiveness raised in this Petition is that Trial Counsel filed and litigated a Motion to Supress [ ] Evidence. This matter proceeded to Trial without the Court ever ruling and issuing an Order as to the suppression issues litigated." Appellant's Am. PCRA Pet., 9/26/13, at ¶ 4. On October 1, 2013, the court issued a Pa.R.Crim.P. 907 notice of its intent to dismiss the petition without a hearing, after which it dismissed the petition on October 22, 2013.[2] Appellant timely filed a notice of appeal.[3]

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[2] Appellant did not respond to the PCRA court's Rule 907 notice.

[3] Although the PCRA court ordered the filing of a Pa.R.A.P. 1925(b) statement on November 25, 2013, Appellant's present counsel did not file a Rule 1925(b) statement until December 18, 2013—two days after the twenty-one-day deadline expired. There was no explanation for the facially untimely filing of the Rule 1925(b) statement. However, we decline to find waiver under Pa.R.A.P. 1925(b)(4)(vii) or to remand this case under Pa.R.A.P. 1925(c)(1) for a determination of whether the statement was timely filed. ***See Commonwealth v. Burton***, 973 A.2d 428, 432-33 (Pa. Super. 2009) (*en banc*). ***But see Commonwealth v. Hill***, 16 A.3d 484, 495 n.14 (Pa. 2011) (noting, in *dicta*, that PCRA is civil in nature and that remand procedures in Pa.R.A.P. 1925(c)(3) for filing of a statement of errors *nunc pro tunc* may not apply).

Appellant presents a single issue in this appeal, namely, whether the PCRA court erred in denying, without an evidentiary hearing, his claim that trial counsel was ineffective for proceeding to trial before receiving an order disposing of his suppression motions. ***See*** Appellant's Brief at 4. In support, Appellant sets forth the following argument:

> If an [e]videntiary hearing had been granted . . . a record would have been established as to the lack of a decision prior to this matter proceeding to [t]rial. . . . It is respectfully argued that it was ineffectiveness of [t]rial [c]ounsel to proceed to trial without having received a decision on the suppression issues he raised . . . .

Id. at 15. No relief is due.

Our standards of review are well settled.

> In reviewing the propriety of a PCRA court's order dismissing a PCRA petition, we are limited to determining whether the PCRA court's findings are supported by the record and whether the order in question 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. Moreover, "[t]here is no absolute right to an evidentiary hearing on a PCRA petition, and if the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." A reviewing court must examine the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and in denying relief without an evidentiary hearing.

Commonwealth v. Springer, 961 A.2d 1262, 1264 (Pa. Super. 2008) (citations omitted). We are further mindful that in order to obtain relief on a claim of ineffective assistance of counsel,

> the PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying claim has arguable merit; (2) counsel whose effectiveness is at issue did not have a reasonable basis for his action or inaction; and (3) the PCRA petitioner suffered prejudice as a result of counsel's action or inaction. . . . [T]o establish prejudice, a petitioner must demonstrate that "but for the act or omission in question, the outcome of the proceedings would have been different." Where it is clear that a petitioner has failed to meet any of the three, distinct prongs . . . the claim may be disposed of on that basis alone, without a determination of whether the other two prongs have been met.

Commonwealth v. Steele, 961 A.2d 786, 796-97 (Pa. 2008) (citations omitted).

Following our review, we are compelled to agree with the PCRA court and the Commonwealth that Appellant's underlying failure to plead prejudice resulted in a waiver of the claim of ineffectiveness giving rise to this appeal. Specifically, we note that the face of the record sustains Appellant's contention that the trial court did not comply with Pa.R.Crim.P. 581(I).[4] Nevertheless, the record makes clear that the trial court intended to deny the suppression motions, ***see*** N.T., at 114 (indicating that trial court decided

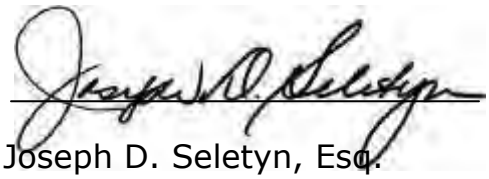
[4] Rule 581(I) states that "the judge shall enter on the record a statement of findings of fact and conclusions of law as to whether the evidence was obtained in violation of the defendant's rights, or in violation of these rules or any statute, and shall make an order granting or denying the relief sought." Pa.R.Crim.P. 581(I).

Because there is no dispute that the trial court failed to comply with Rule 581(I), there was no need for a further evidentiary hearing on the question of whether there was underlying merit to Appellant's claim that an order disposing of his suppression motions was not filed of record.

Appellant's suppression motion off the record, sought immediate scheduling of trial, but granted parties continuance in order to permit, *inter alia*, Appellant's trial counsel to submit supplemental arguments). Thus, Appellant's failure to plead any basis creating a genuine issue of material fact that the outcome of the suppression hearing or an appeal would have been different had trial counsel challenged the trial court's failure to comply with Rule 581(I) is fatal to the instant claim of ineffectiveness.[5]

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/26/2014

[5] Our conclusion should not be read as condoning the trial court's failure to comply with Rule 581(I). Indeed, although not raised by the parties, we are compelled to note that Rule 581(I) is integral to effective review for the purposes of a direct appeal. ***See Commonwealth v. Grundza***, 819 A.2d 66, 68 (Pa. Super. 2003). We further note that in light of Appellant's boilerplate pleadings and argument in this appeal, we need not consider whether the court's failure to comply with Rule 581(I) resulted in the failure to present an issue on direct appeal.