

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
TYREE BUSH,	:	
	:	
Appellant	:	No. 3487 EDA 2012

Appeal from the PCRA Order Entered December 17, 2012,  
In the Court of Common Pleas of Philadelphia County,  
Criminal Division, at No. CP-51-CR-0804121-2006.

BEFORE: SHOGAN, ALLEN and OTT, JJ.

MEMORANDUM BY SHOGAN, J.:

**FILED JUNE 25, 2014**

Appellant, Tyree Bush, appeals from the order entered on December 17, 2012, that dismissed his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The relevant facts and procedural history of this matter are as follows:

On April 19, 2006, around 10:45 A.M., Police Officers Schaffling and Bucchieri were on duty at 6100 N. 7<sup>TH</sup> Street in Philadelphia. They stopped a 1992 Buick Le Sabre (PA license tag GJG-3754), driven by Bush, for failure to use a turn signal while turning onto 7<sup>TH</sup> Street. Bush identified himself as 'Quadir Bush' and said that he was born on December 23, 1983 and was twenty-six (26) years old; however, the Officers recognized Bush, whose forearm was tattooed "Tyree," from prior contact. They ran license checks for Bush and 'Quadir Bush,' the former of which showed that Bush's license was suspended. They ordered Bush out of the vehicle and called for tow operators to perform a live stop

vehicle removal pursuant to 75 PA. C.S. § 6309.2(a).<sup>[1]</sup> Inventory search of the Buick, which was not registered to Bush, led to the recovery of a black Ruger .38 caliber special with a brown handle and an obliterated serial number, loaded with six (6) live rounds, which was underneath the Buick's passenger seat. Officer Schaffling testified that Bush said that the gun was his and did not belong to his girlfriend Latoya Edwards ("Edwards"), who was a passenger.

Edwards, testifying as a defense witness, stated that Bush used his true name during this incident. Edwards also said that the Officers took Bush from the car without stating a reason, searched him, handcuffed him, placed him in the back of the police car, and then searched the Buick three times

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<sup>1</sup> The "live stop" practice for removing a vehicle from a public street when the driver is not properly licensed provides, in relevant part, as follows:

**Immobilization, towing and storage of vehicle for driving without operating privileges or registration**

**(a) General rule.**--Subject to subsection (d), the following shall apply:

(1) If a person operates a motor vehicle or combination on a highway or trafficway of this Commonwealth while the person's operating privilege is suspended, revoked, canceled, recalled or disqualified or where the person is unlicensed, as verified by an appropriate law enforcement officer in cooperation with the department, the law enforcement officer shall immobilize the vehicle or combination or, in the interest of public safety, direct that the vehicle be towed and stored by the appropriate towing and storage agent pursuant to subsection (c), and the appropriate judicial authority shall be so notified.

75 Pa.C.S.A. § 6309.2(a)(1).

before recovering the gun. During cross-examination, Edwards testified that she did not see Bush provide a driver's license to police.

Bush testified that he did not use his brother Quadir's name as an alias in this incident. He denied telling the Officers that the gun recovered was his own.

After this Court denied Bush's Motions to Suppress Physical Evidence and for Recusal, Bush waived his right to a jury and proceeded to trial. Bush's certificate of non-licensure indicated that he was not licensed to carry a firearm in Philadelphia. A ballistics report indicated that the gun recovered in this matter was operable.

PCRA Court Opinion, 6/19/13, at 4-5 (quoting trial court opinion, 10/2/08, at 2-3) (footnote added).

Appellant was found guilty of carrying a firearm without a license and carrying a firearm on a public street in Philadelphia. On January 25, 2007, the trial court sentenced Appellant to an aggregate term of two and one-half to five years of incarceration, followed by three years of probation.

The PCRA court further explained:

On July 12, 2007, Bush filed a Post-Conviction Relief Act ("PCRA") Petition, alleging that trial counsel failed to comply with Bush's request to file an appeal; he also requested new counsel and the reinstatement of his appellate rights. On May 30, 2008, Bush's PCRA Petition was granted by agreement by the Commonwealth and Bush's appellate rights were reinstated *nunc pro tunc*.

On June 27, 2008, Bush filed a Notice of Appeal in the Superior Court of Pennsylvania. On July 2, 2008, pursuant to PA. R.A.P. 1925(b), this Court ordered Bush to file a Concise Statement of Matters Complained of on Appeal ("1925(b)

Statement”) within twenty-one (21) days. On July 22, 2008, Bush requested an extension of the 1925(b) Statement filing deadline, which this Court granted on July 23, 2008. On August 8, 2008, Bush timely filed a 1925(b) Statement. Sondra R. Rodrigues, Esquire entered her appearance on behalf of Bush as Direct Appeal Counsel. On October 3, 2008, the Court issued its 1925(a) Opinion. The Superior Court affirmed the Court’s judgment of sentence on August 20, 2009. Bush unsuccessfully petitioned for allowance of appeal to the Supreme Court of Pennsylvania on September 17, 2009; Bush’s petition was denied on March 16, 2010.

On September 2, 2010, Bush filed his second PCRA petition alleging violations of the Pennsylvania and United States Constitutions; ineffective assistance of counsel; improper obstruction by government officials, unavailability of exculpatory evidence at time of trial; imposition of a sentence greater than the lawful maximum; and that the Trial Court was without jurisdiction to proceed in Bush’s waiver trial.

On April 29, 2011, John P. Cotter, Esquire entered his appearance on behalf of Bush as PCRA Counsel. On October 5, 2011, Mr. Cotter filed a letter stating that Bush’s PCRA claims were without merit pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. 1988) (hereinafter referred to as “Finley Letter”). Upon independent review, the Court requested that PCRA Counsel review the record and submit a response addressing the specific issue of whether Direct Appeal counsel was ineffective for failing to brief all of the issues raised in the August 8, 2008 1925(b) Statement filed of record with the Court. The Court granted a continuance to that effect on December 15, 2011.

On January 12, 2012, Bush, through PCRA Counsel, filed an Amended PCRA Petition wherein stating that Bush was denied effective assistance of counsel on direct appeal.

On February 13, 2012, the Court granted a continuance to enable the Commonwealth to respond to the Amended PCRA Petition. On May 21, 2012, PCRA Counsel withdrew the previously filed Finley Letter and the matter was rescheduled again for Commonwealth response.

On May 21, 2012, Bush filed a Supplemental Amended PCRA Petition, wherein Bush alleged that Direct Appeal Counsel was ineffective for failing to brief a suppression issue dealing with physical evidence and sought a second *nunc pro tunc* direct appeal. On July 16, 2012, the Commonwealth filed a Motion to Dismiss Bush's Amended PCRA Petition.

On November 20, 2012, upon independent and careful review of Bush's Amended PCRA Petition and the Commonwealth Motion to Dismiss, the Court issued a Notice of Intent to Dismiss Bush's PCRA Petition pursuant to Pa.R.A.P. 907. On December 17, 2012, the Court entered an Order formally dismissing Bush's PCRA Petition.

On December 20, 2012, Bush filed Notice of Appeal in the Superior Court of Pennsylvania. On January 2, 2013, pursuant to Pa. R.A.P. 1925(b), this Court ordered Bush to file a Concise Statement of Matters Complained of on Appeal ("1925(b) Statement") within twenty-one (21) days. Bush did not comply and the Court issued a 1925(a) Opinion to this effect on February 19, 2013. On March 18, 2013, the Superior Court granted Bush's "Petition to Remand to Trial Court to Allow Appellant to File 1925(b) Statement" and remanded this matter back to the Trial Court for disposition.

On March 21, 2013, the Court again ordered Bush to file a 1925(b) Statement within twenty-one (21) days. Bush complied and filed a 1925(b) Statement on March 26, 2013[.]

PCRA Court Opinion, 6/19/13, at 1-3 (internal footnote omitted).

In this appeal, Appellant raises one issue: "Did the trial court err in denying the appellant an evidentiary hearing?" Appellant's Brief at 2. Initially, we point out that Appellant's statement of the questions involved is woefully deficient and in violation of Pa.R.A.P. 2116(a) which states: "No question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby." Pa.R.A.P. 2116(a). Additionally, this

Court may quash or dismiss an appeal if the appellant fails to conform to the requirements set forth in Pa.R.A.P. 2101. However, while Appellant's statement of the questions presented fails to establish the issue he is attempting to raise, we decline to find waiver as we are able to discern Appellant's issue from the argument section of his brief. Appellant argues that direct appeal counsel was ineffective for not challenging the trial court's denial of the motion to suppress because he had a reasonable expectation of privacy in the vehicle, the police did not comply with the live stop regulations and, thus, the police lacked probable cause to search the car. Appellant's Brief at 6.

When reviewing the propriety of an order granting or denying PCRA relief, this Court is limited to determining whether the evidence of record supports the determination of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Boyd***, 923 A.2d 513, 515 (Pa. Super. 2007). Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. ***Commonwealth v. Wilson***, 824 A.2d 331, 333 (Pa. Super. 2003). There is no right to an evidentiary hearing on a PCRA petition, and the PCRA court may decline to hold a hearing if the claims are patently frivolous and without a trace of support in the record. ***Commonwealth v. Jordan***, 772 A.2d 1011, 1014 (Pa. Super. 2001). On

review, we examine the issues raised in the petition in light of the record 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. ***Id.***

When considering an allegation of ineffective assistance of counsel, we note that counsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his or her conduct; and (3) Appellant was prejudiced by counsel's action or omission. ***Commonwealth v. Pierce***, 527 A.2d 973, 975-976 (Pa. 1987). "In order to meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different." ***Commonwealth v. Wallace***, 724 A.2d 916, 921 (Pa. 1999). A claim of ineffective assistance of counsel will fail if the petitioner does not meet any of the three prongs. ***Commonwealth v. Williams***, 863 A.2d 505, 513 (Pa. 2004) (quoting ***Commonwealth v. Rush***, 838 A.2d 651, 656 (Pa. 2003)).

As set forth above, Appellant argues that direct appeal counsel was ineffective for failing to pursue a claim that the suppression court erred because, as Appellant baldly asserts, he had a reasonable expectation of

privacy in the vehicle, the police did not comply with the live stop regulations, and the police did not have probable cause to search the vehicle. We disagree.

The PCRA court addressed Appellant's claim of error as follows:

[A]s the Court's analysis in its October 2008 1925(a) Opinion states, Bush failed to prove that he had a legitimate expectation of privacy in the subject Buick; Bush was properly stopped by the police officer due to his failure to use his turn signal; because Bush was operating the vehicle with a suspended license, the police officer properly impounded the vehicle and conducted an inventory search in accordance with the spirit of 75 PA. C.S. § 6309.2(a). Trial Court Opinion. (10/02/2008), at 5-7. Direct [appeal] Counsel's failure to brief this issue before the Superior Court is of no moment because the underlying claim that the Court erred declining to suppress evidence obtained from the Buick is itself without merit.

The Court restates its analysis on the suppression issue as follows:

Bush claims that his Motion to Suppress should have been granted, alleging that the Commonwealth failed to show that the police did not violate his right to privacy in the Buick and that the police did not adhere to the "live stop" procedures as set forth in 75 PA. C.S. § 6309.2(a). Upon review, this Court disagrees and finds no error. The right to be free from unreasonable searches and seizures is personal in nature. *Cmwltth. v. Millner*, 888 A.2d 680, 691 (Pa. 2004). In Pennsylvania, a defendant charged with a possessory offense has automatic standing to move for the suppression of the evidence that the possessory crime is based upon when his claim is that the evidence was the fruit of an unlawful seizure. *Cmwltth v. Sell*, 470 A.2d 457 (Pa. 1983). However, the mere fact of a defendant's automatic standing does not immediately shift the burden of proof to the Commonwealth; a defendant must still demonstrate his reasonable expectation of privacy in



the invaded place as a predicate to his claim of unlawful search or seizure. *Cmwlth. v. Millner*, 888 A.2d 680, 691 (Pa. 2005) (harmonizing *Sell* and its progeny by explicitly noting that a defendant with automatic standing is not absolved of his obligation to demonstrate that the challenged police conduct implicated a reasonable expectation of privacy that the defendant personally possessed). Where a defendant fails to prove a legitimate expectation of privacy, claims of illegal police conduct need not be addressed. *Id.* at 692; *see also Cmwlth. v. Dugan*, 855 A.2d 103 (Pa. Super. 2004) (defendant's reasonable expectation of privacy in a borrowed truck's contents was adequately demonstrated where the defendant said that he borrowed the truck, attempted to find the vehicle registration, and then contacted and produced the owner, who verbally corroborated that he lent the truck to defendant, when the registration could not be found).

Here, Bush failed to show that he had a legitimate expectation of privacy in the Buick. Bush did not demonstrate that he owned the Buick or that he operated it with the permission of its owner. N.T. TRIAL (12/15/06) at 33. Accordingly, Bush's claim of illegal police conduct need not be addressed.

Furthermore, in considering the merits of Bush's claim, the police's actions in impounding the Buick and performing an inventory search were legal and proper, as they adhered to the spirit of the live stop procedures. Inventory searches are a well-defined exception to the search warrant requirement. [*Commonwealth v. Henley*, 909 A.2d [352,] 359 [(Pa. Super. 2006)]] (citations omitted).

Inventory searches are permissible, as they are designed to safeguard seized items for the benefit of both the police and the defendant, rather than to uncover criminal evidence. *Id.* An automobile inventory search is permitted where (1) the police have lawfully impounded the automobile; and (2) the police have acted in

accordance with a reasonable, standard policy of routinely securing and inventorying the impounded vehicle's contents. *Id.* An inventory search is reasonable if it is conducted pursuant to reasonable standard police procedures and in good faith and not for the sole purpose of investigation. *Id.* (citing *Colorado v. Bertine*, 479 U.S. 367, 374 (1987) ("reasonable police regulations relating to inventory procedures of automobiles administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure").

An officer may stop a motor vehicle if he reasonably believes that a Motor Vehicle Code provision is being violated. *Cmwlth. v. Henley*, 909 A.2d 352, 358 (Pa. Super. 2006) (collecting cases). Incident to a stop, an officer may check the vehicle's registration and the driver's license and issue a citation. *Id.* Where an officer verifies that a driver's operating license is suspended, the officer shall either immobilize the vehicle or, in the interest of public safety, direct that the vehicle be towed and stored by the appropriate agent. 75 PA. C.S. § 6309.2(a).

Here, the police lawfully impounded the Buick and inventoried its contents properly in accordance with police procedures. Bush was stopped due to his failure to use his turn signal, in violation of the Motor Vehicle Code, 75 PA. C.S. § 3334(a). N.T. TRIAL (12/15/06) at 34. Incident to the stop, Officer Schaffling verified that Bush's operating license was suspended. *Id.* Officer Schaffling impounded the vehicle and conducted an inventory search in accordance with the spirit of 75 PA. C.S. § 6309.2(a). *Id.* at 35.

As this Court properly denied Bush's Motion to Suppress, Bush's claim of error fails.

Trial Court Opinion. (10/02/2008), at 5-7.

To the extent that Bush directs this Court's attention to *Commonwealth v. Thurman*, 872 A.2d 838 (Pa. Super. 2005) for the proposition that his vehicle was improperly impounded and towed, the Court took *Thurman* into consideration in its denial of Bush's motion to suppress physical evidence. N.T. TRIAL (12/15/2006), at 35-37. In *Thurman*, the Superior Court held that Defendant Thurman's vehicle was improperly impounded and towed in contravention of applicable statutory provisions, namely 75 PA.C.S. § 6309.2, which outlines that procedure for towing and storing vehicles. *Thurman*, 872 A.2d at 841-842. Because of the improper impoundment and tow of Thurman's vehicle, the resultant seizure of physical evidence from the vehicle was improper. *Id.* at 838-839, 843. In turn, the inventory search was improper and the physical evidence obtained from the improper inventory search was improperly admitted into evidence. *Id.*

The Court also took *Commonwealth v. Hennigan*, 753 A.2d 245 (Pa. Super. 2000) into consideration when denying Bush's motion to suppress. N.T. TRIAL (12/15/2006), at 36-37. In *Hennigan*, the Superior Court held, among other dispositions, that Defendant Hennigan's motion to suppress physical evidence should have been granted because the Commonwealth failed to demonstrate its authority to impound Hennigan's vehicle. *Hennigan*, 753 A.2d at 259-260. Therefore, Hennigan's vehicle was improperly impounded, and thus improperly searched, which in turn rendered the fruits of the improper search inadmissible. *Id.* The Court in *Hennigan* vacated the judgment of sentence supported by the fruits of the improper search and improper vehicle impoundment.

The Court compared the holdings and analysis of both *Thurman* and *Hennigan* to *Commonwealth v. Millner*, 888 A.2d 680 (Pa. 2005), wherein the Supreme Court held that Defendant Millner did not demonstrate that he had a legitimate expectation of privacy in a vehicle that he did not own or to which he was not connected. *Millner*, 888 A.2d at 692. As such, the Supreme Court reversed both the Superior Court and Trial Court decisions to suppress a resultant firearm seized after a search of a vehicle which Millner was operating. *Id.* at 693.

Here, as the Court stated in its October 2008 1925(a) Opinion, Bush did not demonstrate that he had a legitimate

expectation of privacy in the Buick where the physical evidence, a firearm, was seized. Trial Court Opinion. (10/02/2008), at 5-7. Bush did not demonstrate that he owned the Buick or that he operated it with the permission of its owner. N.T. TRIAL (12/15/06), at 33. This is the key distinction between the facts as presented in both *Thurman* and *Hennigan* as defendants in both of those cases demonstrated that they had a legitimate expectation of privacy by virtue of their ownership of the impounded, towed and searched vehicles. *Thurman*, 872 A.2d at 838-39; *Hennigan*, 753 A.2d at 250-51. Furthermore, as the Court stated in its October 2008 1925(a) Opinion, the police's actions in impounding the Buick and performing an inventory search were legal and proper, as they adhered to the spirit of Pennsylvania's live stop procedures. Trial Court Opinion. (10/02/2008), at 5-7. Therefore, the claim of ineffective assistance of counsel for failure to brief the suppression issue addressed herein is without arguable merit.

**b. Bush has not specifically addressed the issue of direct appeal counsel's unreasonableness in her omissions**

The Court declined to have an evidentiary hearing on Bush's claims of ineffective assistance of counsel for the reasons stated below. Therefore, Bush did not have the opportunity to create a record as to the reasonableness of direct appeal counsel's failure to brief the physical evidence suppression issue before the Superior Court. However, the Court notes that Bush failed to properly plead Direct Appeal Counsel's unreasonableness pursuant to applicable principles. Specifically, Bush did not specifically argue that Direct Appeal Counsel was unreasonable in her decision to forgo on direct appeal three (3) of the five issues raised in Bush's 1925(b) Statement and addressed in this Court's October 2008 1925(a) Opinion. As discussed at length in [*Commonwealth v. Gilbert Jones*, 815 A.2d 598 (Pa. 2002)], counsel is not "constitutionally obliged to raise every conceivable claim for relief." *Gilbert Jones*, 815 A.2d at 613. Indeed, a petitioner must at least attempt to demonstrate that identified, ignored or otherwise abandoned claims were stronger than the claims actually pursued. *Id.* Here, Bush makes bald assertions of Direct Appeal Counsel's ineffectiveness for her failure to pursue the issue of the Court's denial of Bush's motion to suppress physical evidence. Therefore, Bush did not even attempt to properly plead Direct

Appeal Counsel's unreasonableness in her omission on direct appeal.

PCRA Court Opinion, 6/19/13, at 8-12.

Upon review, we agree with the PCRA court's conclusion, and we discern no basis upon which to disturb the order denying Appellant PCRA relief. Appellant's bald claims of error are frivolous and unsupported in the record. Nothing in the record supports the conclusion that counsel was unreasonable in not pursuing the suppression issue on direct appeal because there is no evidence of a reasonable expectation of privacy, the absence of probable cause, or a violation of 75 Pa.C.S.A. § 6309.2. Thus, Appellant has failed to satisfy both the reasonable basis and arguable merit prongs of the test for ineffective assistance of counsel. **Pierce**, 527 A.2d at 975-976. Moreover, because we find Appellant's claims have no support in the record, we conclude that the PCRA court committed no error in denying Appellant's PCRA petition without a hearing. **Jordan**, 772 A.2d at 1014.<sup>2</sup>

After review, we conclude that Appellant is entitled to no relief. Accordingly, we affirm the order denying Appellant's PCRA petition.

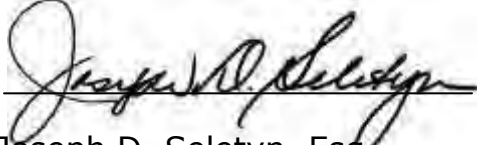
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<sup>2</sup> Additionally, we point out that, even if Appellant had established that he had permission to use the vehicle and, therefore, possessed a reasonable expectation of privacy, the fact remains that he had a suspended license and could not have moved the car. Thus, the police would have moved the vehicle pursuant to 75 Pa.C.S.A. § 6309.2, and in the inventory of the car, the firearm would have been discovered. For this reason, we conclude that Appellant has failed to prove that, but for appellate counsel's decision to abandon the suppression issue on appeal, the result would have been different. Accordingly, Appellant has also failed to establish prejudice. **Pierce**, 527 A.2d at 975-976.

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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: 6/25/2014