NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee,	:	
	:	
v.	:	
	:	
BRIAN D. DELEON,	:	
	:	
Appellant	:	No. 41 MDA 2014

Appeal from the PCRA Order December 16, 2013,
Court of Common Pleas, Berks County,
Criminal Division at No. CP-06-CR-0004391-2011

BEFORE: DONOHUE, JENKINS and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED AUGUST 15, 2014**

Brian D. DeLeon ("DeLeon") appeals from the order entered on December 16, 2013 by the Court of Common Pleas of Berks County, Criminal Division, denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The trial court aptly summarized the facts of this case as follows:

> In September of 2011, the Berks County District Attorney's Office initiated an investigation involving a group of individuals from the New York/New Jersey area, who were known to be trafficking large volumes of heroin into Berks County, specifically Reading Pennsylvania. On Thursday, September 29, 2011, three members of the group, including Felix Fernandez [('Fernandez')] and Rafael Mercado [('Mercado')], arrived in Reading, Pennsylvania in anticipation of a delivery of heroin to Berks County undercover sources. As a result of the meeting, Fernandez delivered a large quantity of heroin to the undercover source. On October 4, 2011, Fernandez and [DeLeon] met with undercover sources in

*Retired Senior Judge assigned to the Superior Court.

> Reading, Pennsylvania and discussed another delivery of heroin for the following day. On October 5, 2011, Fernandez, Mercado, and another unknown male arrived in Reading, Pennsylvania and met with undercover sources. A short time later, Fernandez delivered to the undercover sources a large quantity of heroin.
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> On Saturday October 15, 2011, Fernandez advised undercover sources that they were going to be in Reading, Pennsylvania to deliver a large volume of heroin. On or around 7:50 p.m., on October 15, 2011, Fernandez, Mercado, and [DeLeon] arrived in the City of Reading in a silver Acura TSX. In an attempt to arrest the occupants for felony drug violations and secure the vehicle pending a search warrant, the [p]olice approached the Acura TSX as it parked. Once the [d]etectives approached the vehicle, Detective Leporace observed [DeLeon] attempting to conceal an object while sitting in the back seat of the vehicle. As another officer pulled [DeLeon] out of the vehicle, Detective Leporace testified that he identified the object in [DeLeon]'s hand as a set of keys with a car key on it. Ten minutes after securing the scene, Detective Leporace approached [DeLeon] in order to engage him in conversation. Detective Leporace read [DeLeon] his ***Miranda*** rights and began questioning him about his involvement. Detective Leporace testified that Detective Ortiz asked [DeLeon] if there were 'drugs on South 15th Street or in the woods.' [DeLeon] responded, 'maybe.' Both Detective Leporace and Detective Ortiz then asked [DeLeon] if he would help them find the drugs and [he] again responded, 'maybe.' Detective Leporace testified that he then asked [DeLeon] if [he] would help them find the drugs if they took [him] to the area near South 15th Street in the City of Reading. Following this conversation, [DeLeon] agreed to travel with the [d]etectives to the area close to South 15th Street.
>
> Fifteen minutes later, the [d]etectives and [DeLeon] arrived in the area of Pandora Park[,] which is

> located near South 15th Street. Detective Leporace testified that he then sternly questioned [DeLeon] about the location of the drugs. In response, [DeLeon] admitted that he did not know what he had gotten himself into and that the drugs were in his mother's car, a green Honda, parked on the 400 block of Franklin Street. [DeLeon] then took the [d]etectives to his mother's car and pointed it out to the [d]etectives. After pointing out the car, Detective Leporace testified that he asked [DeLeon] where the keys were for the vehicle. [DeLeon] confirmed that the keys to the green Honda were left in the back[]seat of the Acura TSX.
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> On October 16, 2011, Detective Ortiz received search warrants for the Acura TSX and green Honda, The green Honda was registered to [DeLeon]'s mother at the time of the search. During the search of the Acura TSX, Detective Ortiz testified that he did seize a set of keys to the Honda, which were then handed to Detective Leporace. Detective Leporace brought the Honda in to be searched, and the [d]etectives found numbered bricks of heroin in the trunk of the Honda. The street value of the heroin found in the trunk of the Honda was estimated to be $73,000.00.

PCRA Court Opinion, 12/16/13, at 2-4 (citations to the record omitted). The trial court also summarized the procedural history of this case as follows:

> On August 31, 2012, a jury convicted [DeLeon] of [p]ossession of a [c]ontrolled [s]ubstance with [i]ntent to [d]eliver, [p]ossession of a [c]ontrolled [s]ubstance, and two corresponding counts of [c]riminal [c]onspiracy. On September 4, 2012, [DeLeon] was sentenced to a total term of incarceration of five (5) to ten (10) years, followed by seven (7) years of probation. [DeLeon] was represented by Jacob Gurwitz, Esquire through trial and sentencing.

> On or about September 6, 2012, [DeLeon] filed a [m]otion for [n]ew [t]rial and to [m]odify [s]entence. This [m]otion was denied by this [c]ourt on September 11, 2012. On January 28, 2013, [DeLeon] filed, *pro se*, a [p]etition for [r]elief under the [PCRA]. On February 19, 2013, this [c]ourt appointed Lara Glenn Hoffert, Esquire, (PCRA counsel) to represent [DeLeon] in the disposition of his PCRA proceedings. PCRA [c]ounsel was directed to file an [a]mended PCRA [p]etition pursuant to [Pennsylvania Rule of Criminal Procedure] 905 detailing [DeLeon]'s eligibility for relief or to file a '[n]o-[m]erit' [l]etter requesting to withdraw from representation pursuant to ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) and ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988). On or about May 30, 2013, [DeLeon] filed an [a]mended [p]etition for [r]elief. An evidentiary hearing was held on [DeLeon]'s PCRA [p]etition on October 22, 2013.
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> After reviewing the entire record in this case and considering the arguments and evidence presented by [DeLeon] at the PCRA hearing, this [c]ourt [found] that [he was] not entitled to relief under the PCRA.

Id. at 1-2.

On January 2, 2014, DeLeon filed a notice of appeal. On January 8, 2014, the trial court ordered DeLeon to file a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On January 28, 2014, DeLeon timely filed his Rule 1925(b) statement. On appeal, DeLeon raises the following issue for review:

> Whether the PCRA court erred in denying [DeLeon]'s [p]etition for [r]elief under the PCRA where pretrial/trial counsel was ineffective for failing to file a motion to suppress statements made to law

> enforcement as well as the physical evidence seized as a direct result of those statements.

DeLeon's Brief at 4.

We review the denial of PCRA relief by "examining whether the PCRA court's findings of fact are supported by the record, and whether its conclusions of law are free from legal error." ***Commonwealth v. Busanet***, 54 A.3d 35, 45 (Pa. 2012) (citation omitted). "Our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the party who prevailed in the PCRA court proceeding." ***Id.***

DeLeon claims that the PCRA court erred by failing to find that trial counsel was ineffective for not filing a motion to suppress the statements that he made to police and the physical evidence seized as a result of those statements. DeLeon's Brief at 8-14. In reviewing an allegation of ineffective assistance of counsel, we begin with the assumption that counsel was effective. ***Commonwealth v. Pierce***, 527 A.2d 973, 975 (Pa. 1987). Our Supreme Court has stated, "[t]o merit relief based on an ineffectiveness claim under the PCRA, a petitioner must show that such ineffectiveness 'in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.'" ***Commonwealth v. Collins***, 957 A.2d 237, 244 (Pa. 2008) (quoting 42 Pa.C.S.A. § 9543(a)(2)(ii)). This standard requires "a

petitioner to prove that: (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice." ***Id.*** (citation omitted). Regarding the second prong of the ineffective assistance of counsel test, our Court has stated the following:

> As a general rule, matters of trial strategy are left to the determination of counsel, and a defendant is not entitled to appellate relief simply because a chosen strategy is unsuccessful. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. […] Accordingly, before a claim of ineffectiveness can be sustained, it must be determined that, in light of all the alternatives available to counsel, the strategy actually employed was so unreasonable that no competent lawyer would have chosen it. We inquire whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered to advance and protect defendant's interests. Thus, counsel's assistance is deemed constitutionally effective once we are able to conclude the particular course chosen by counsel had some reasonable basis designated to effectuate his client's interests. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation of the record.

Commonwealth v. Buska, 655 A.2d 576, 582-83 (Pa. Super. 1995) (quotations and citations omitted). Importantly, the failure by the petitioner "to satisfy any one of the three prongs of the test for ineffectiveness requires rejection of the claim." ***Collins***, 957 A.2d at 244 (citation omitted).

We conclude that the PCRA court did not err in denying DeLeon's ineffective assistance of counsel claim because DeLeon has failed to prove that trial counsel's strategy lacked a reasonable basis. Trial counsel testified that the reason he did not file a motion to suppress was that he believed police had probable cause to arrest DeLeon. N.T., 11/13/13, at 10-14. Trial counsel asserted that he believed police had probable cause to arrest DeLeon for two reasons. First, DeLeon was with Fernandez on October 4, 2011 when Fernandez discussed a delivery of heroin with an undercover source that was to occur the following day. ***Id.*** at 10. Second, DeLeon was in the back seat of the Acura TSX on October 15, 2011 when police apprehended Fernandez and Mercado. ***Id.*** Trial counsel stated that he wanted to get DeLeon the best plea offer possible because he believed that DeLeon would lose at trial, and any plea offer that he received from the Berks County District Attorney was contingent on not filing any omnibus pretrial motions. ***Id.*** at 14-15. Thus, trial counsel believed that he would be able to get DeLeon a better plea agreement if he did not file a motion to suppress. ***Id.*** at 14-21. Though DeLeon rejected the Commonwealth's offers, trial counsel testified that he never filed a motion to suppress throughout the pre-trial process because both he and DeLeon wanted to see if they could get a better offer. ***See id.*** at 20.

DeLeon argues that trial counsel's strategy lacked a reasonable basis because police did not have probable cause to arrest him. DeLeon's Brief at

9-11. DeLeon claims that his presence with Fernandez on October 4, 2011 and his presence in the back seat in the silver Acura TSX on October 15, 2011 did not amount to the probable cause necessary to arrest him without a warrant. DeLeon's Brief at 9-11. DeLeon asserts that "his only offense was his presence, as an entirely unknown individual to an ongoing investigation, during a controlled buy which occurred a distance from the vehicle in which he remained." ***Id.*** at 10. Additionally, DeLeon contends that trial counsel's strategy of forgoing the filing of a motion to suppress in favor of negotiating a better plea agreement lacked a reasonable basis because he did not wish to plead guilty. ***Id.*** at 12-14.

There are three levels of interaction that occur between police and citizens that our courts recognize as relevant to the analysis of whether law enforcement violated the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution:

> The first of these is a 'mere encounter' (or request for information) which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond. The second, an 'investigative detention' must be supported by reasonable suspicion; it subjects a suspect to a stop and period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of arrest. Finally, an arrest or 'custodial detention' must be supported by probable cause.
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> [I]n assessing the lawfulness of citizen/police encounters, a central, threshold issue is whether or not the citizen-subject has been seized. Instances of police questioning involving no seizure or detentive

> aspect (mere or consensual encounters) need not be supported by any level of suspicion in order to maintain validity. Valid citizen/police interactions which constitute seizures generally fall within two categories, distinguished according to the degree of restraint upon a citizen's liberty: the investigative detention or ***Terry*** stop, which subjects an individual to a stop and a period of detention but is not so coercive as to constitute the functional equivalent of an arrest; and a custodial detention or arrest, the more restrictive form of permissible encounters. To maintain constitutional validity, an investigative detention must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity and may continue only so long as is necessary to confirm or dispel such suspicion; whereas, a custodial detention is legal only if based on probable cause. To guide the crucial inquiry as to whether or not a seizure has been effected, the United States Supreme Court has devised an objective test entailing a determination of whether, in view of all surrounding circumstances, a reasonable person would have believed that he was free to leave. In evaluating the circumstances, the focus is directed toward whether, by means of physical force or show of authority, the citizen-subject's movement has in some way been restrained. In making this determination, courts must apply the totality-of-the-circumstances approach, with no single factor dictating the ultimate conclusion as to whether a seizure has occurred.

Commonwealth v. Williams, 73 A.3d 609, 613-14 (Pa. Super. 2013), *appeal denied*, 87 A.3d 320 (Pa. 2014) (internal citations and quotations omitted).

The encounter between DeLeon and the police in this case was a custodial detention. As police approached the silver Acura TSX, they observed DeLeon trying to hide something between the cushions in the back

seat. N.T., 8/30/12, at 85-86. When police reached the vehicle, an officer "yanked" DeLeon from the vehicle. ***Id.*** at 86. After securing the scene, Detective Leporace read DeLeon his ***Miranda*** rights and began questioning him. ***Id.*** at 90-91. At that point, the encounter was a custodial detention. ***See Commonwealth v. Donaldson***, 786 A.2d 279, 286 (Pa. Super. 2001) (holding that "once Appellant was ordered to exit his vehicle and given ***Miranda*** warnings he had been fully 'seized' for search and seizure law purposes and was, therefore, in custodial detention"). Because this encounter constituted a custodial detention, police needed probable cause in order to arrest DeLeon. ***See Williams***, 73 A.3d at 613-14.

Police may arrest a suspect without a warrant, *inter alia*, if the officer has probable cause that the suspect has committed a felony. Pa.R.Crim.P. 502(2)(b). Our Supreme Court has adhered to the following standard for probable cause:

> Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we require ***only a probability***, and not a *prima facie* showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

Commonwealth v. Thompson, 985 A.2d 928, 931 (Pa. 2009) (internal citations and quotations omitted, emphasis in original).

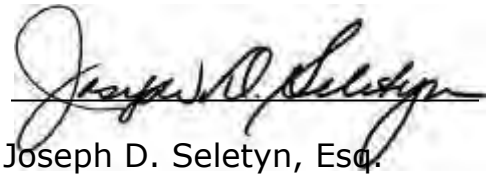
Here, the record reflects that DeLeon was present at a meeting on October 4, 2011 where at least Fernandez, and possibly both Fernandez and DeLeon, discussed the details of a drug transaction that was to occur the following day. ***See*** Affidavit of Probable Cause, 11/1/11, at 1; ***see also*** N.T., 8/30/12, at 152. However, the extent of DeLeon's involvement in that meeting is unclear. ***See*** N.T., 10/22/13, at 11-12. The certified record also reveals that DeLeon was present in the vehicle that Fernandez and Mercado had used during previous drug transactions when that vehicle arrived at the predetermined location for the transaction that was to take place on October 15, 2011. Affidavit of Probable Cause, 11/1/11, at 1; ***see also*** N.T., 8/30/12, at 80-81, 85. Finally, the certified record shows that as police approached the vehicle on October 15, 2011, police became concerned that DeLeon was attempting to conceal a weapon because they observed him engaging in furtive movements as he was attempting to hide something between the backseat cushions. N.T., 8/30/12, at 84-85.

Based on this information, it is clear that police had reasonable suspicion to conduct an investigatory detention and protective frisk of DeLeon. ***See Commonwealth v. Simmons***, 17 A.3d 399, 404 (Pa. Super. 2011) (holding that the observation of furtive movements, within the scope of a lawful traffic stop, led police to reasonably be concerned for their safety

and therefore justified a protective frisk). However, the question of whether DeLeon's presence at the meeting on October 4, 2011 coupled with his presence in the vehicle on October 15, 2011, plus his furtive movements inside that vehicle amounted to probable cause is less clear. We need not specifically decide whether probable cause existed because the issue is whether trial counsel's strategy in foregoing the motion was reasonable. Given that a successful resolution of a suppression motion was far from clear, we cannot say that trial counsel's strategy "was so unreasonable that no competent lawyer would have chosen it." ***See Buska***, 655 A.2d at 582. Based on the significant evidence that the Commonwealth had against DeLeon, trial counsel sought to get DeLeon the best plea agreement that he could, which required trial counsel not to file a motion to suppress. We cannot say that trial counsel's assistance was ineffective because his strategy "had some reasonable basis designated to effectuate his client's interests." ***See id.*** Therefore, DeLeon failed to prove the second prong of the ineffective assistance of counsel test and as a result, his claim fails. ***Collins***, 957 A.2d at 244 (citation omitted). Accordingly, the trial court did not err in denying DeLeon's PCRA petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/15/2014