

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JOHN NERONE

Appellant

No. 547 WDA 2013

Appeal from the PCRA Order February 27, 2013
In the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0000930-2009
CP-11-CR-0000934-2009

BEFORE: PANELLA, J., MUNDY, J., and STABILE, J.

MEMORANDUM BY PANELLA, J.:

FILED: May 12, 2014

Appellant, John Nerone, appeals from the order denying his petition pursuant to the Post Conviction Relief Act ("PCRA"), entered by the Honorable Norman A. Krumenacker, III, Court of Common Pleas of Cambria County. After careful review, we affirm.

On March 10, 2010, a jury convicted Nerone of various crimes arising from acts of violence involving his Wife and 2-month-old son. On May 13, 2010, the trial court sentenced Nerone to an aggregate sentence of imprisonment of 12 to 45 years. The trial court denied Nerone's post-sentence motions, and this Court affirmed Nerone's judgment of sentence *via* a memorandum dated December 21, 2011.

Nerone filed a *pro se* petition pursuant to the PCRA on March 1, 2012. The PCRA court immediately appointed counsel to represent Nerone in connection with his petition. However, on October 26, 2012, appointed counsel filed a petition to withdraw, alleging that Nerone's constant harassment of and threat towards counsel and his staff prevented counsel from representing Nerone's best interests. After a hearing, the PCRA court granted counsel leave to withdraw.

A hearing on Nerone's petition was subsequently held, and, on February 27, 2013, the PCRA court denied Nerone's petition. On March 5, 2013, the PCRA court appointed counsel to represent Nerone for purposes of appeal. This timely appeal followed and newly appointed counsel filed a statement of matters complained of on appeal. New counsel, Nerone's third, was subsequently appointed to represent Nerone for the remainder of the appellate process.

On appeal, Nerone raises three issues for our review:

- I. Whether the trial court erred when it denied Appellant's PCRA petition based on the finding that Appellant's trial counsel was not ineffective in failing to present a defense to his charges which focused on the mental and emotional condition of his Wife as a means to challenge her credibility before the jury?
- II. Whether the trial court erred when it denied Appellant's PCRA petition based on the finding that Trial Counsel was not ineffective in failing to introduce into evidence text messages, and, more importantly, Appellant's wife's journals during the trial as part of a defense to question the credibility of Appellant's wife before the jury?
- III. Whether the trial court erred when it failed to appoint PCRA counsel for Appellant's first PCRA petition?

Appellant's Brief, at 2.¹

We must address Nerone's final issue first, as its resolution could require a remand on procedural grounds to allow appointed counsel the opportunity to file an amended PCRA petition. Nerone contends that the PCRA court erred pursuant to the following reasoning:

There is no indication on the docket that [first appointed PCRA counsel] filed a no-merit letter pursuant to **Turner/Finley**, nor that the PCRA Court did an independent review of the record or informed Appellant that he could proceed *pro se* or with private counsel. Since there is no no-merit letter of record, then new counsel should have been appointed to represent Appellant at his PCRA hearing.

Appellant's Brief, at 12. However, Nerone's argument mischaracterizes the record.

On October 26, 2012, first appointed PCRA counsel filed a petition to withdraw from representing Nerone. In this petition, counsel alleged that Nerone had repeatedly threatened and harassed counsel and his staff. Pursuant to Nerone's actions, counsel opined that he was no longer capable of representing Nerone's best interests, due to irreconcilable differences. Conspicuously missing from the petition is any allegation regarding the merit of the issues raised by Nerone. Furthermore, the petition alleged that

¹ Nerone raised one additional matter, whether the trial court abused its discretion in imposing sentence, in his Statement of the Questions Involved. However, Nerone explicitly abandons this issue in his argument. **See** Appellant's Brief, at 5.

appointed counsel had prepared, but not yet filed, an amended petition pursuant to the PCRA on Nerone's behalf.

On November 7, the PCRA court granted counsel's petition to withdraw, and Nerone proceeded *pro se* until after the PCRA court denied his petition. An indigent defendant may forfeit his right to appointed counsel through dilatory or improper behavior. ***See Commonwealth v. Lucarelli***, 601 Pa. 185, 971 A.2d 1173 (2009). After a defendant has been found to have forfeited his right to appointed counsel, the decision to appoint new counsel is reserved to the discretion of the trial court. ***See Commonwealth v. Kelly***, 5 A.3d 370, 382 n. 10 (Pa.Super. 2010). "If the defendant does not agree with his counsel, he has a right to present his own contentions; but the sovereign has no duty to search for counsel until it finds one who will agree with him." ***Id.***, at 381 (citation omitted).

While counsel's petition to withdraw and ensuing order do not use the word "forfeit," it is clear from the allegations of Nerone's misconduct, combined with a lack of discussion of the merits of Nerone's issues, that the PCRA court found that Nerone had forfeited his right to counsel. Furthermore, Nerone does not contend that the PCRA court erred in permitting first appointed counsel to withdraw; rather, Nerone argues that the PCRA court erred in failing to appoint substitute counsel. As noted above, the PCRA court had a duty to appoint counsel, but was not required to engage in a prolonged search for counsel that appeased Nerone. As we

can discern no abuse of discretion in the PCRA court's decision to refuse to appoint substitute counsel after it found that Nerone had forfeited his right to counsel, we conclude that this issue merits no relief on appeal.

In his remaining arguments on appeal, Nerone contends that the PCRA court erred in failing to find his trial counsel was ineffective. Our standard of review of a PCRA court's denial of a petition for post-conviction relief is well-settled. We must examine whether the record supports the PCRA court's determination and whether the PCRA court's determination is free of legal error. **See Commonwealth v. Hall**, 867 A.2d 619, 628 (Pa. Super. 2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. **See Commonwealth v. Carr**, 768 A.2d 1164, 1166 (Pa. Super. 2001). Our scope of review is limited by the parameters of the PCRA. **See Commonwealth v. Heilman**, 867 A.2d 542, 544 (Pa. Super. 2005).

In addressing claims of ineffectiveness of counsel, we apply the following principles of law:

In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, ineffective assistance of counsel which, 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 ... Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Johnson, 868 A.2d 1278, 1281 (Pa. Super. 2005) (citation omitted). Moreover, “[w]e presume counsel is effective and place upon Appellant the burden of proving otherwise.” **Commonwealth v. Springer**, 961 A.2d 1262, 1267-1268 (Pa. Super. 2008) (citation omitted).

This Court will grant relief only if an Appellant satisfies each of the three prongs necessary to prove counsel ineffective. **Commonwealth v. Natividad**, 595 Pa. 188, 208, 938 A.2d 310, 322 (2007). Thus, we may deny any ineffectiveness claim if the “evidence fails to meet a single one of these prongs.” *Id.*, 595 Pa. at 207-208, 938 A.2d at 321 (citation omitted).

First, Nerone argues that trial counsel was ineffective in failing to present evidence of his wife’s mental instability in an attempt to shift blame for the injuries suffered by his son to her. Nerone highlights his wife’s diary entries, prescription history, and opinions relating to his wife’s coping mechanisms. The PCRA court ruled that Nerone failed to carry his burden of proof on any of the three prongs of the ineffectiveness test. Our review of the hearing transcript reveals, *inter alia*, that Nerone did not present any testimony from trial counsel regarding the trial strategy involved in these decisions. Absent this evidence, we cannot conclude that the PCRA court erred in concluding that Nerone had failed to carry his burden of proof in establishing ineffectiveness of trial counsel.

Nerone also contends that the PCRA court erred in finding that trial counsel was not ineffective in failing to present evidence of text messages between Nerone and his wife and his wife's diary entries. Nerone argues that the text messages would have established that his wife was with their child during the time frame that the injuries occurred. Furthermore, Nerone argues that one text message established that he was telling his wife not to touch their child anymore. However, trial counsel testified that, while she had transcripts provided by Nerone's parents, Nerone was unable to locate the text messages themselves despite having several hours to do so during her interviews with him. **See** N.T., PCRA Hearing, 2/26/13, at 73. Since trial counsel did not have access to the text messages prior to trial, we cannot find fault in the PCRA court's conclusion that she was not ineffective for failing to present them at trial.

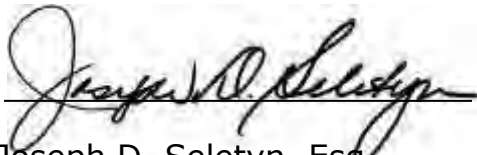
Turning to the diary entries, Nerone argues that certain diary entries would have directly contradicted his wife's trial testimony, and therefore should have been admitted to attack her credibility. Trial counsel testified that she was able to attack Nerone's wife's credibility through other means, including public postings on websites and Facebook, and that the journal also contained a passage where Nerone's wife stated that she was afraid of what would happen if Nerone was left alone with the child. **See id.**, at 85-87. Trial counsel testified that she believed that admitting the journal entries identified by Nerone risked allowing the passage about wife's fear of

leaving him alone with the child, and that the damage cause by this evidence would have been far more damaging than whatever benefit could have been gained from the other passages in the journal. **See id.** The PCRA court found this testimony credible, and we cannot conclude that this finding was an error of law or abuse of discretion. Accordingly, we conclude that this issue merits no relief.

As we conclude that none of Nerone's issues on appeal merit relief, we affirm the order denying his petition pursuant to the PCRA.

Order affirmed. Jurisdiction relinquished.

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: 5/12/2014