NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CHRISTINA LYNN CONLEY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 704 MDA 2014

Appeal from the PCRA Order March 25, 2014
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0002494-2013;
CP-67-CR-0002497-2013

BEFORE: GANTMAN, P.J., JENKINS, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED DECEMBER 23, 2014**

Appellant, Christina Lynn Conley, appeals from the order entered in the York County Court of Common Pleas, denying her first petition brought pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm and grant counsel's petition to withdraw.

The relevant facts and procedural history of this appeal are as follows. Appellant lived at the Mountain View Terrace mobile home park. GSP Management Company ("GSP") owns and operates Mountain View Terrace. On January 29, 2013, Mountain View Terrace experienced a problem with the system that pumped water into residents' trailers. GSP assigned one of

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[1] 42 Pa.C.S.A. §§ 9541-9546.

its maintenance supervisors, Jeffery Despain, to investigate the problem. Mr. Despain determined there was a leak somewhere on the premises, but he needed to inspect fifteen to twenty trailers to find the exact location of the leak. Appellant's trailer was one of the residences requiring inspection.

Sometime after dark, Mr. Despain approached Appellant's trailer and lifted up the "skirting" to check for leakage or a break in the waterline.[2] (N.T. Trial, 8/14/13-8/15/13, at 90). While Mr. Despain performed the inspection, he heard Appellant yelling inside the residence. Appellant wanted to know who was outside. Mr. Despain responded, "[I]t's maintenance. I'm here checking for a water leak." (***Id.***) Appellant opened the door, asserted there were no leaks under her trailer, and insisted that Mr. Despain was not allowed on her property. Mr. Despain explained that, under certain circumstances, maintenance personnel could enter a resident's property.

At that point, Appellant indicated she had a firearm in her residence, and "she was going to go in and load it, and the next time [Mr. Despain] or any other GSP member comes on her property, she was going to shoot [them]." (***Id.*** at 91). Mr. Despain immediately fled the scene and informed his supervisor about the confrontation. After another confrontation between

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[2] Mr. Despain could not remember the exact time he approached Appellant's residence, but he stated: "It was in the evening…. I had been out there for hours. It was already…dark out." (***Id.*** at 91).

Appellant and two other GSP maintenance workers, Mr. Despain informed the police about Appellant's threat.

The Commonwealth charged Appellant with terroristic threats and related offenses. On February 13, 2013, police attempted to serve an arrest warrant at Appellant's residence. Officers went to the mobile home park and knocked on Appellant's door for approximately ten minutes. Although Appellant's vehicle was in the driveway, no one opened the door. After numerous attempts, the officers left the mobile home park. Five minutes after the officers departed, one of Appellant's neighbors informed police that Appellant was at her residence. Consequently, the officers immediately returned to the mobile home park.

Outside Appellant's residence, Officer Christopher Martinez exited his vehicle. Officer Martinez heard a door slam and observed Appellant running away from her residence and the officers. Officer Martinez and Officer Grimme pursued Appellant on foot, yelling to her to stop. Ultimately, the officers caught up to Appellant, took her to the ground, and arrested her.

Following trial, a jury convicted Appellant of terroristic threats and flight to avoid apprehension. On October 30, 2013, the court sentenced Appellant to three (3) to twenty-three (23) months' imprisonment for the terroristic threats conviction, plus a consecutive term of one (1) year of probation for the flight conviction. Appellant did not file post-sentence motions or a notice of appeal.

On December 12, 2013, Appellant timely filed a *pro se* PCRA petition. In it, Appellant raised multiple claims of ineffective assistance of trial counsel. The court appointed counsel, who did not file an amended PCRA petition. On March 25, 2014, the court conducted an evidentiary hearing and received testimony from Appellant and trial counsel. Immediately following the hearing, the court denied PCRA relief.

Appellant timely filed a notice of appeal on April 22, 2014. On April 23, 2014, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b), and Appellant complied. Subsequently, counsel filed with this Court a petition to withdraw representation and "no-merit" letter, pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (*en banc*).

As a preliminary matter, we must address PCRA counsel's withdrawal request. "Before an attorney can be permitted to withdraw from representing a petitioner **under the PCRA**, Pennsylvania law requires counsel to file and obtain approval of a 'no-merit' letter pursuant to the mandates of ***Turner*/*Finley***." ***Commonwealth v. Karanicolas***, 836 A.2d 940, 947 (Pa.Super. 2003) (emphasis in original).

> [C]ounsel must…submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which the petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa.Super. 2007). Counsel must also send to the petitioner a copy of the "no-merit" letter or brief and petition to withdraw and advise the petitioner of her right to proceed *pro se* or with new counsel. ***Id.*** "Substantial compliance with these requirements will satisfy the criteria." ***Karanicolas, supra*** at 947.

Instantly, counsel filed a ***Turner***/***Finley*** letter on appeal and a petition to withdraw as counsel. Counsel listed the issues Appellant wished to raise and explained why the issues merit no relief. Counsel has indicated that he sent Appellant a copy of the "no-merit" letter. The "no-merit" letter informs Appellant about counsel's withdrawal petition and advises her of the right to proceed *pro se* or with private counsel. Thus, counsel has substantially complied with the ***Turner***/***Finley*** requirements. Accordingly, we proceed to an independent evaluation. ***See Commonwealth v. Widgins***, 29 A.3d 816 (Pa.Super. 2011) (stating court must conduct independent review and agree with counsel that issues raised were meritless).

As Appellant has filed neither a *pro se* brief nor a counseled brief with new counsel, we review this appeal on the basis of the issues raised in the ***Turner***/***Finley*** letter:

> WHETHER THE PCRA COURT ERRED IN DENYING THE PETITION FOR POST-CONVICTION RELIEF ON THE BASIS THAT [APPELLANT'S] TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PRESENT EVIDENCE AT TRIAL THAT [APPELLANT] HAD COMPLAINED TO THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL

> PROTECTION ABOUT THE RESIDENTIAL PROPERTY MANAGEMENT COMPANY AFTER THE INITIAL JANUARY 29, 2013 INCIDENT, IN ORDER TO DEMONSTRATE TO THE JURY THAT THE COMPLAINANTS, WHO WORKED FOR THE RESIDENTIAL PROPERTY MANAGEMENT COMPANY, FABRICATED THEIR TESTIMONY IN RETALIATION FOR [APPELLANT'S] COMPLAINTS?
>
> WHETHER THE PCRA COURT ERRED IN DENYING THE PETITION FOR POST-CONVICTION RELIEF ON THE BASIS THAT [APPELLANT'S] TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CROSS-EXAMINE COMPLAINANT JEFF DESPAIN REGARDING THE JANUARY 29, 2013 INCIDENT?
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> WHETHER THE PCRA COURT ERRED IN DENYING THE PETITION FOR POST-CONVICTION RELIEF ON THE BASIS THAT [APPELLANT'S] TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PRESENT EVIDENCE THAT [APPELLANT] HAD PURCHASED HER CAR EARLIER ON FEBRUARY 13, 2013, THEREBY CONTRADICTING OFFICER MARTINEZ'S TESTIMONY THAT ON THAT SAME DAY HE HAD RECOGNIZED [APPELLANT'S] VEHICLE FROM PRIOR INCIDENTS?
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> WHETHER THE PCRA COURT ERRED IN DENYING THE PETITION FOR POST-CONVICTION RELIEF ON THE BASIS THAT [APPELLANT'S] TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INTRODUCE EVIDENCE, INCLUDING PHOTOGRAPHS AND MEDICAL RECORDS, REGARDING THE INJURIES SHE SUFFERED DURING HER FEBRUARY 13, 2013 ARREST, IN SUPPORT OF HER ARGUMENT THAT THE POLICE FILED THE FLIGHT TO AVOID APPREHENSION CHARGE TO COVER UP THE EXCESSIVE POLICE FORCE EMPLOYED TO ARREST [APPELLANT]?

(***Turner***/***Finley*** Letter at 4-5).

Our standard of review of the denial of a PCRA petition is limited to

examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). We give no such deference, however, to the court's legal conclusions. ***Commonwealth v. Ford***, 44 A.3d 1190 (Pa.Super. 2012). "Traditionally, issues of credibility are within the sole domain of the trier of fact [because] it is the trier of fact who had the opportunity to personally observe the demeanor of the witnesses." ***Commonwealth v. Abu-Jamal***, 553 Pa. 485, 527, 720 A.2d 79, 99 (1998), *cert. denied*, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 38 (1999). "[A]s with any other credibility determination, where the record supports the PCRA court's credibility determinations, those determinations are binding" on this Court. ***Id.***

In her first issue, Appellant asserts the GSP maintenance workers, including Mr. Despain, fabricated their trial testimony. Appellant alleges the workers testified against her to retaliate for a complaint Appellant lodged against GSP with the Pennsylvania Department of Environmental Protection ("DEP"). Appellant argues trial counsel was ineffective for failing to present evidence to establish that the DEP complaint gave the GSP workers motive

to fabricate their testimony. Appellant concludes she is entitled to a new trial on this basis. We disagree.

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Williams***, 597 Pa. 109, 950 A.2d 294 (2008). When asserting a claim of ineffective assistance of counsel, the petitioner is required to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his 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. Kimball***, 555 Pa. 299, 724 A.2d 326 (1999). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Williams, supra***.

"The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit…." ***Commonwealth v. Pierce***, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004).

> Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate [her] client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective.

Pierce, supra at 524, 645 A.2d at 194-95 (internal citations omitted).

> Prejudice is established when [a defendant] demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In [***Kimball, supra***]*,* we held that a "criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Commonwealth v. Chambers, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002) (some internal citations and quotation marks omitted). "A defendant is not prejudiced by the failure of counsel to present merely cumulative evidence…." ***Commonwealth v. Spotz***, 587 Pa. 1, 66, 896 A.2d 1191, 1229 (2006).

Instantly, the certified record contains ample evidence of the complaint Appellant lodged with the DEP. On direct examination, Appellant explained the genesis of the DEP complaint:

> When I first moved into the mobile home park, which was in 2001, I had suspected that there [were] water issues because I'm a highly intelligent woman, and I have called the DEP. In 2004, I had the water checked. I have a letter.
>
> They said there was nothing wrong in the water, but actually a five-year investigation was launched, and it was settled out of court with the DEP with this management company for 2.2 million dollars.

(***See*** N.T. Trial at 159.)

Additionally, trial counsel's cross-examination of Mr. Despain touched upon Appellant's DEP complaint:

> [TRIAL COUNSEL]: Okay. To your knowledge, has [Appellant] ever made complaints about you to the [DEP]?
>
> [COMMONWEALTH]: Objection.
>
> [TRIAL COUNSEL]: Your Honor, it goes to the witness's motive.
>
> THE COURT: I will overrule. If he knows, he can answer the question.
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> [TRIAL COUNSEL]: To your knowledge, has [Appellant] ever made reports or complaints about you to the—
>
> [MR. DESPAIN]: Yes, once before.
>
> [TRIAL COUNSEL]: Were you subject to sanctions or discipline as a result of that?
>
> [COMMONWEALTH]: Objection, that's not relevant.
>
> [TRIAL COUNSEL]: Again, Your Honor, it goes to motive.
>
> THE COURT: I'll overrule.
>
> [MR. DESPAIN]: No, I was not because they knew for a fact that it was a false statement.

(***See id.*** at 97.)[3]

Here, trial counsel's cross-examination explored whether Appellant's DEP complaint motivated Mr. Despain's actions against Appellant. Under

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[3] Two other GSP maintenance workers, John Bonham and Clyde Miller, testified on behalf of the Commonwealth. Their testimony did not address Appellant's DEP complaint. Rather, Mr. Bonham and Mr. Miller testified about a separate incident, for which the Commonwealth charged Appellant with disorderly conduct. Ultimately, the court acquitted Appellant of the disorderly conduct charges.

these circumstances, Appellant's trial counsel presented evidence of motive *via* cross-examination, and Appellant's claim lacks arguable merit. ***See Pierce, supra***; ***Poplawski, supra***.

In her second issue, Appellant contends trial counsel failed to cross-examine Mr. Despain about the time, weather, and circumstances surrounding their encounter. Appellant maintains such questioning would have established that Mr. Despain's actions caused Appellant to fear for her safety. Further, Appellant claims trial counsel should have cross-examined Mr. Despain about Appellant's attempt to explain the "castle doctrine" during their encounter.[4] Appellant argues trial counsel was ineffective for failing to conduct an adequate cross-examination of Mr. Despain. Appellant concludes she is entitled to a new trial on this basis. We disagree.

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[4] In this context, the "castle doctrine" has been defined as follows:

> [T]he proposition that a person's dwelling house is a castle of defense for [herself] and [her] family, and an assault on it with intent to injure [her] or any lawful inmate of it may justify the use of force as protection, and even deadly force if there exist reasonable and factual grounds to believe that unless so used, a felony would be committed.

Weiand v. State, 732 So.2d 1044, 1049 n.5 (Fla. 1999). At the PCRA hearing, Appellant testified that she attempted to explain the "castle doctrine" to Mr. Despain during their encounter. Appellant further testified, "I wanted [trial counsel] to bring up the fact that I had brought up the ["castle doctrine"] legislation to [Mr. Despain] trying to explain—I felt that he was putting himself in danger by the way he scared me." (***See*** N.T. PCRA Hearing, 3/25/14, at 15.)

Instantly, Appellant testified that Mr. Despain's inspection woke her up on the evening in question. Appellant explained that she initially feared for her safety when she heard Mr. Despain outside her residence:

> Well, we've had a lot of burglaries and thefts and a trailer down the street that was just rewired…had their copper stolen, so when I heard the dog barking and heard this noise, which was the skirting being ripped off of my home, it scared me.
>
> I thought it was…someone trying to see if I had copper under my trailer because we have had a lot of theft in the neighborhood. There's a lot of problems [on] that mountain.

(***See*** N.T. Trial at 147.)

Appellant claimed she went to the door, yelling that she had a firearm and a dog inside her residence. After Mr. Despain identified himself, Appellant opened the door intending to apologize. Appellant indicated that it was dark outside, but she recognized Mr. Despain from prior encounters. Appellant described Mr. Despain's demeanor:

> He was in a very bad mood. January 29th was one of the coldest days of our wintertime. It was cold. I believe it was close to zero, if not below zero that day.
>
> He was very frustrated when he came onto my property. He had complete attitude when the dog ran out….

(***Id.*** at 148). Appellant added:

> I tried to educate him about the castle bill and that it would be wise that he knocks on people's doors. I'm on a mountain with 300 acres in my backyard, and there is a lot of crime, and being single and being scared—and I don't own a gun. I just said that because I was scared and half-asleep.

(***Id.*** at 149).

Here, Appellant's testimony gave the jury her version of the circumstances surrounding the encounter with Mr. Despain. Any additional evidence regarding the time and weather, Mr. Despain's disposition, or the "castle doctrine" conversation would have been cumulative. ***See Spotz, supra***. Thus, there is no arguable merit to Appellant's claim that counsel was ineffective for failing to conduct an adequate cross-examination of Mr. Despain to establish these same facts. ***See Pierce, supra***; ***Poplawski, supra***.

In her third issue, Appellant emphasizes Officer Martinez's testimony that police observed Appellant's vehicle in the driveway while serving the arrest warrant on February 13, 2013. Appellant asserts she had purchased the vehicle in the driveway, a black Chevrolet Monte Carlo, earlier in the day on February 13, 2013; therefore, police could not have recognized the vehicle as Officer Martinez stated. Appellant argues trial counsel was ineffective for failing to impeach Officer Martinez on this point. Appellant concludes she is entitled to a new trial on this basis. We disagree.

Instantly, Officer Martinez described the officers' initial attempt to serve the arrest warrant:

> Approximately for ten minutes, we were there, calling out to [Appellant], we did know her vehicle was in the driveway, and we recognized the vehicle from previous dealings. We continued to knock at the residence, asked [Appellant] to come to the door, that we had an arrest

> warrant in hand for her, we needed to speak with her.

(***See*** N.T. Trial at 125.)

Appellant, however, disputed Officer Martinez's account. Appellant insisted the officers could not have recognized the vehicle in her driveway from previous dealings, because she had just purchased the vehicle earlier that same day. Appellant explained:

> Before the police came to my home on the 13th [of February], I had just bought that Monte Carlo that day an hour before this happened. That Monte Carlo, that black car they testified about that they have seen…before, I just bought the car. They never [saw] that car before.

(***Id.*** at 160).

Here, Appellant's testimony effectively countered Officer Martinez's testimony regarding Appellant's vehicle. Any additional evidence regarding the timing of Appellant's vehicle purchase would have been cumulative. ***See Spotz, supra***. Thus, Appellant's claim regarding trial counsel's failure to impeach Officer Martinez on this point lacks arguable merit. ***See Pierce, supra***; ***Poplawski, supra***.

In her fourth issue, Appellant claims the Commonwealth charged her with flight to avoid apprehension, to cover up the excessive force police used against Appellant during her arrest. Appellant insists medical records and photographs existed to support her claim of excessive force, but trial counsel failed to offer these items into evidence. Appellant argues trial counsel was ineffective for failing to present the evidence detailing the injuries she

suffered due to the purported use of excessive force during her arrest. Appellant concludes she is entitled to a new trial on this basis. We disagree.

Instantly, Officer Martinez conceded he used force to take Appellant into custody. Officer Martinez testified that he chased Appellant, caught up with her, and "basically did a takedown maneuver on [Appellant], threw her down onto the ground." (***See*** N.T. Trial at 127.) During her direct examination, Appellant claimed she could not flee from the officers, because of back and ankle injuries. Appellant also stated that an officer "body slammed" her to the ground before applying handcuffs. (***Id.*** at 183).

At the PCRA hearing, trial counsel admitted she knew Appellant had suffered some injury during her arrest. Nevertheless, trial counsel declined to pursue the issue, because "there was video of [Appellant] being taken into custody that the DA and [trial counsel] agreed not to introduce, that it frankly didn't portray [Appellant] in a very good light." (***See*** N.T. PCRA at 29.) On cross-examination, trial counsel elaborated:

> [PCRA COUNSEL]: And can you explain to the court why—did you argue to the jury about the police exaggerating or fabricating parts of their story in order to cover up their excessive use of force at the time of her arrest? Did you argue that?
>
> [TRIAL COUNSEL]: No, I didn't. As I said, the DA did show to me video of [Appellant] being taken into custody that directly undercut her claims, so I did not focus on that too much in my argument.
>
> [PCRA COUNSEL]: Okay. You said that video was not played at trial?

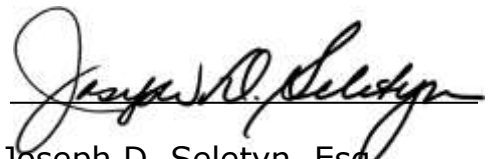
> [TRIAL COUNSEL]: It was not played at trial.
>
> [PCRA COUNSEL]: What did that video show?
>
> [TRIAL COUNSEL]: The video showed…the officers pursuing [Appellant] up a trail alongside a mountain I believe, and they were yelling at her that she needed to stop. She was not stopping, and they eventually had to take her to the ground and walked her back to their vehicle and placed her into the police car. It was very different than how [Appellant] described it to me.

(***Id.*** at 31).

Here, trial counsel had a reasonable basis for deciding not to pursue Appellant's claim of police brutality. Specifically, trial counsel did not want to "open the door" to the possible admission of the unfavorable police video. Because trial counsel had a reasonable basis for her actions, she was not ineffective in this regard. ***See Pierce, supra***. Accordingly, we affirm the order denying PCRA relief and grant counsel's petition to withdraw.

Order affirmed; petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2014