NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
GERALD R. HUNT JR.,	:	
	:	
Appellant	:	No. 945 MDA 2013

Appeal from the PCRA Order May 8, 2013
In the Court of Common Pleas of Susquehanna County
Criminal Division No(s).: CP-58-CR-0000425-1996

BEFORE: ALLEN, LAZARUS, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JULY 10, 2014**

Appellant, Gerald R. Hunt, Jr., appeals from the order entered in the Susquehanna County Court of Common Pleas dismissing his timely first Post Conviction Relief Act[1] ("PCRA") petition. Appellant claims the PCRA court erred by dismissing his petition without a hearing. His petition raised claims of ineffective assistance of counsel with respect to various sentencing issues and a plea offer. We affirm.

We adopt the facts and procedural history set forth by the PCRA court. ***See*** PCRA Ct. Op., 4/3/13, at 1-5; ***see also Commonwealth v. Hunt***, 814

* Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541-9546.

MDA 2008 at 2-4 (Pa. Super. Sept. 9, 2009) (unpublished memorandum).[2] In addition, we note the following. On January 12, 1999, Randy Joseph Saam testified at Appellant's trial about entering a plea of guilty for third-degree murder (as an accomplice for killing the instant victim) in exchange for a sentence of twelve to twenty-five years in prison if he cooperated with the Commonwealth and seventeen to forty years in prison if he did not. N.T. Trial, 1/12/99, at 118, 231-32. In the afternoon of January 13, 1999, the

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[2] For ease of disposition, we reiterate our disposition of Appellant's challenge to his sentence on direct appeal:

> Appellant lastly challenges his sentence of twenty to forty years for third-degree murder. Appellant claims that at the time of the offenses, the applicable sentencing guidelines stated a standard sentencing range of 105 to 120 months for third-degree murder. He contends the court erred by sentencing him to the statutory maximum . . . . We disagree.
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> * * *
>
> In 1994, the Sentencing Guidelines provided a standard guideline range of 105-120 months for third-degree murder. In 1995, the legislature amended the statute to increase the maximum sentence to 240 months. The Sentencing Guidelines were not amended to reflect the new statutory maximum until 1997. Appellant, however, committed the murder on September 30, 1996, after the legislature amended the statute but before the Sentencing Guidelines were amended to reflect the new statutory maximum. If we were to agree with Appellant's argument, then we would render meaningless well-established caselaw holding that the courts are not bound by the Sentencing Guidelines.

Hunt, 814 MDA 2008 at 7, 11 (citation omitted).

Commonwealth made a plea offer to Appellant, which he rejected. N.T. Trial, 1/13/99, at 81. Following the PCRA court's dismissal of Appellant's PCRA petition, he timely appealed and timely filed a court-ordered Pa.R.A.P. 1925(b) statement.

Appellant raises the following issues on appeal:

> Whether the [PCRA] court erred in denying, without a hearing, [Appellant's] claim that trial counsel was ineffective for failing to argue for a sentence below the statutory maximum?
>
> Whether the [PCRA] court erred in denying, without a hearing, [Appellant's] claim that trial counsel was ineffective for failing to present mitigating evidence at sentencing?
>
> Whether the [PCRA] court erred in denying, without a hearing, [Appellant's] claim that trial counsel was ineffective for failing to properly advise [Appellant] regarding the plea offer and the possible maximum sentence?

Appellant's Brief at 2 (capitalization omitted).

We summarize Appellant's arguments for all of his issues. Appellant initially argues that his counsel was ineffective by not arguing for a standard range sentence. He maintains he was entitled to an evidentiary hearing. Appellant also suggests counsel was ineffective by failing to (1) present mitigating evidence and (2) properly advise him regarding the plea offer.

With respect to the plea offer, Appellant alleges that the Commonwealth offered a sentence of fifteen to thirty years in prison in exchange for his guilty plea. He complains that he "mistakenly understood"

that his sentence could not exceed ten to twenty years and thus advised his counsel to reject the plea offer. Appellant's Amended PCRA Pet., 1/15/13, at 5-6. Appellant suggests that counsel was unaware that the maximum sentence for third-degree murder had been increased from twenty to forty years in prison. Thus, Appellant speculates that had counsel been aware, counsel would have corrected Appellant's misunderstanding, and he would have accepted the Commonwealth's plea offer. We hold Appellant is not entitled to relief.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1267 (Pa. 2008) (citation omitted). Further, when the PCRA court denies relief without an evidentiary hearing, this Court must examine each of the issues raised in light of the record to determine whether the PCRA court erred in concluding there were no genuine issues of material fact. ***Commonwealth v. Rios***, 920 A.2d 790, 823 (Pa. 2007).

> [C]ounsel 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. To demonstrate prejudice, an appellant must prove that a reasonable probability of acquittal existed but for the action or omission of trial counsel. A claim of ineffective assistance of counsel will fail if the petitioner does not meet any of the three prongs. Further, a PCRA petitioner must exhibit a concerted effort to develop his

> ineffectiveness claim and may not rely on boilerplate allegations of ineffectiveness.

Commonwealth v. Perry, 959 A.2d 932, 936 (Pa. Super. 2008) (quotation marks and citations omitted).

> Generally, the question of whether the PCRA court erred in its determination that trial counsel was ineffective for failing to investigate and present sufficient mitigating evidence depends upon a myriad of factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that **could have been presented**. None of these factors, by itself, is dispositive of the question presented, because even if the investigation conducted by counsel was unreasonable, such fact alone will not result in relief if the defendant cannot demonstrate that he was prejudiced by counsel's conduct.

Commonwealth v. Ligons, 971 A.2d 1125, 1149 (Pa. 2009) (citations omitted and emphasis added).

Additionally, in a third-degree murder case addressing a standard range twenty to forty year sentence, this Court held the following on direct appeal:

> Since the sentencing court had and considered a presentence report, this fact alone was adequate to support the sentence, and due to the court's explicit reliance on that report, we are required to presume that the court properly weighed the mitigating factors present in the case. . . .
>
> Furthermore, it is settled that sentencing is committed to the sound discretion of the trial court. The factual basis for [the defendant's] guilty plea establishes that [the defendant] pointed a firearm at the unarmed victim and shot at him three times. We can find no reason to place this case outside of the standard range, which is presumptively where a defendant should be sentenced.

Commonwealth v. Fowler, 893 A.2d 758, 766 (Pa. Super. 2006) (citations omitted). Finally, we may affirm on any basis. ***Commonwealth v. Clouser***, 998 A.2d 656, 661 n.3 (Pa. Super. 2010).

Initially, we discern no arguable merit to the underlying claim that Appellant's counsel should have argued for a standard range sentence. ***See Perry***, 959 A.2d at 936. As noted in our decision on direct appeal, at the time Appellant was sentenced, the Sentencing Guidelines had not yet been revised to conform to the new statutory maximum minimum sentence of twenty years. ***See Hunt***, 814 MDA 2008 at 11. Moreover, the trial court has never been bound by the Sentencing Guidelines. ***See id.***

Further, given that the ***Fowler*** Court discerned no abuse of discretion in a standard range sentence of twenty to forty years for third-degree murder in which the unarmed victim was, *inter alia*, shot three times, we similarly perceive no merit to a claim that the instant trial court was obligated to sentence Appellant to an outdated Sentencing Guideline standard range sentence of 105 to 120 months in which the victim was, *inter alia*, shot thirteen times. ***Cf. Fowler***, 893 A.2d at 766. In sum, at the time of Appellant's sentencing, the Sentencing Guidelines' standard range sentence for third-degree murder had not been revised to reflect the legislative change increasing the maximum minimum sentence from ten to twenty years. Accordingly, counsel could not have been ineffective. ***See***

Perry, 959 A.2d at 936. Regardless, it is well-settled that a court is not bound by the Sentencing Guidelines. ***See Hunt***, 814 MDA 2008 at 11.

Moreover, although Appellant's counsel did not explicitly request the court to impose a standard range sentence, counsel extensively discussed the mitigating factors. ***See, e.g.***, N.T. Sentencing Hr'g, 1/21/99, at 6-7. Appellant, in contrast, asserted his innocence. ***Id.*** at 8. The court acknowledged reviewing the presentence report and thus we presume the court properly weighed the mitigating factors. ***Id.*** at 17; ***cf. Fowler***, 893 A.2d at 766.

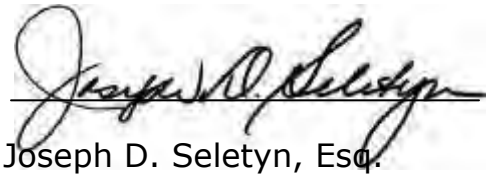
As for Appellant's claim that counsel was ineffective for not presenting mitigating evidence and witnesses, Appellant failed to identify with any specificity the mitigating evidence such witnesses would have presented. ***See Ligons***, 971 A.2d at 1149. Given that Appellant did not discuss the mitigation evidence that "could have been presented," ***id.***, we discern no error in the instant PCRA court's determination that Appellant failed to establish prejudice. ***See id.***; ***see also Clouser***, 998 A.2d at 661 n.3. Appellant failed to establish a reasonable probability that the outcome of the sentencing proceeding would have been different, given that Appellant, *inter alia*, shot the victim at least thirteen times. ***Cf. Fowler***, 893 A.2d at 766 (affirming standard range sentence of twenty to forty years in prison for third-degree murder in which defendant shot victim three times).

With respect to Appellant's assertion regarding the plea, we hold Appellant's argument is internally inconsistent. Appellant was present when Mr. Saam, his accomplice, testified to receiving a plea deal for third-degree murder of twelve to twenty-five years' imprisonment if he cooperated and seventeen to forty years' imprisonment if he did not. ***See*** N.T. Trial, 1/12/99, at 118, 231-32. Both of Mr. Saam's potential maximum sentences for third-degree murder exceeded twenty years. ***See id.*** Thus, Appellant's counsel cannot be found ineffective for failing to correct Appellant's alleged misimpression that the maximum sentence was twenty years for third-degree murder because Appellant, just the prior day, heard his accomplice testify about receiving a sentence in excess of that. ***See Perry***, 959 A.2d at 936. Accordingly, having discerned no genuine issues of material fact, ***see Rios***, 920 A.2d at 823, we affirm the order below, albeit on other grounds.[3] ***See Clouser***, 998 A.2d at 661 n.3; ***see also Abu-Jamal***, 941 A.2d at 1267.

Order affirmed.

[3] To the extent the PCRA court appears to suggest affidavits are required to substantiate an ineffective assistance of counsel claim or that "layering" ineffectiveness claims is required in this case, the PCRA court erred.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/10/2014