

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

KEITH E. FULMER

Appellant

No. 717 EDA 2015

Appeal from the PCRA Order February 25, 2015
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0002971-2008

BEFORE: DONOHUE, J., MUNDY, J., and MUSMANN, J.

MEMORANDUM BY MUNDY, J.:

FILED DECEMBER 29, 2015

Appellant, Keith E. Fulmer, appeals from the order entered February 25, 2015, dismissing his first petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 (PCRA). After careful consideration, we affirm based on the thorough and well-supported opinion of the Honorable David F. Bortner.

The PCRA court has fully summarized the procedural history of this case, which we adopt and need not restate here.¹ PCRA Court Opinion, 2/25/15, at 1-2. On appeal, Appellant raises the following issues for our review.

¹ Appellant and the PCRA court are compliant with Pennsylvania Rule of Appellate Procedure 1925. In its Rule 1925(a) opinion the PCRA court referenced its February 25, 2015 opinion that accompanied its dismissal order as containing its reasons for denying Appellant relief.

I. Whether [the] trial court erred in dismissing [Appellant's] claim that the ten year mandatory sentence pursuant 18 Pa. C.S.A. Section 9718(a)(1) was unconstitutional by ruling that his claim cannot be applied retroactively as this claim was not pending during his direct appeal?

II. Ineffective Assistance of Counsel

A. Whether appellate counsel, who also served as trial counsel, rendered ineffective assistance for failing to properly present, litigate, preserve, and raise on direct appeal, the trial court's ruling to exclude evidence that the complainant, A.G., was engaged in sexual conduct with [Appellant's] son as admissible to support the complainant's motive to testify falsely regarding the alleged sexual contact with [Appellant].

B. Whether trial counsel/appellate counsel, rendered ineffective assistance in his handling of a prosecution witness for (a) failing to object to the testimony of the mother of complainant's friend who stated that the complainant was "honest," as an attempt to improperly bolster the credibility of the complainant (b) failing to cross-examine the witness regarding a motive for the complainant's accusations and (c) trial counsel's failure to cross-examine the witness regarding her knowledge of criminal investigation into a crime committed by the complainant?

C. Whether trial counsel/appellate counsel rendered ineffective assistance for failing to properly object to hearsay statements and/or raise on direct appeal several inadmissible hearsay statements?

(1) Whether trial counsel/appellate counsel rendered ineffective assistance for failing to argue on appeal the

objection raised regarding the excited utterance by the complainant to her father regarding an alleged attempt by petitioner to bribe her to change her story?

(2) Whether trial counsel/appellate counsel was ineffective for failing to raise on appeal the admission of hearsay evidence.

D. Whether trial counsel rendered ineffective assistance of counsel for failing to request an alibi instruction after presenting several witnesses that provided alibi testimony regarding one of only two alleged sexual encounters with Appellant that specified a date, time and location?

E. Whether trial counsel rendered ineffective assistance for failing to file a bill of particulars requiring the Commonwealth to establish on or around which dates/ months the specific charges attached[?] Failure to request the specific information left too much speculation for the jury to consider evidence which covered an eight month period of time?

F. Whether trial counsel rendered ineffective assistance for failing to request a jury instruction that the Commonwealth had to prove lack of consent with respect to the charge of involuntary deviate sexual intercourse?

G. Whether trial counsel/appellate counsel rendered ineffective assistance for failing to question the defense witnesses regarding the lack of veracity or truthfulness of the complainant?

H. Whether trial counsel rendered ineffective assistance for failing to properly present available evidence to refute the

prosecutor's characterization of the circumstances within [Appellant's] home at during [sic] the time period of the alleged crimes?

III. Newly discovered evidence

A. Whether a new trial is warranted based on the newly discovered evidence that the complainant had been sexually involved with [Appellant's] son during the same time period which the Commonwealth alleges petitioner was sexually abusing the complainant?

Appellant's Brief at 8-10.

We address these issues according to the following standards.

Our standard of review of the denial of a PCRA petition is limited to examining whether the court's rulings are supported by the evidence of record and free of legal error. This Court treats the findings of the PCRA court with deference if the record supports those findings. It is an appellant's burden to persuade this Court that the PCRA court erred and that relief is due.

Commonwealth v. Feliciano, 69 A.3d 1270, 1274-1275 (Pa. Super. 2013)

(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 prevailing party at the PCRA court level. The PCRA court's credibility determinations, when supported by the record, are binding on this Court. However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions.

Commonwealth v. Medina, 92 A.3d 1210, 1214-1215 (Pa. Super. 2014)

(*en banc*) (internal quotation marks and citations omitted), *appeal granted*,

105 A.3d 658 (Pa. 2014). Additionally, in order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. **Id.** at § 9543(a)(3).

When reviewing a claim of ineffective assistance of counsel, we apply the following test, first articulated by our Supreme Court in **Commonwealth v. Pierce**, 527 A.2d 973 (Pa. 1987).

When considering such a claim, courts presume that counsel was effective, and place upon the appellant the burden of proving otherwise. Counsel cannot be found ineffective for failure to assert a baseless claim.

To succeed on a claim that counsel was ineffective, Appellant must demonstrate that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) counsel's ineffectiveness prejudiced him.

...

[T]o demonstrate prejudice, appellant must show there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different.

Commonwealth v. Michaud, 70 A.3d 862, 867 (Pa. Super. 2013) (internal quotation marks and citations omitted). "Failure to establish any prong of the test will defeat an ineffectiveness claim." **Commonwealth v. Birdsong**, 24 A.3d 319, 330 (Pa. 2011).

After a thorough review of the record, the PCRA petition and proceedings, we conclude the PCRA court has comprehensively addressed the merits of each of Appellant's issues and found them wanting. We perceive that the PCRA court has, where appropriate, made findings of fact, that the record supports, to which we defer. **See Feliciano, supra.** We further observe that the PCRA court has accurately stated the relevant law and standards of proof relative to Appellant's issues and properly applied them to the facts of this case. We conclude the reasoning expressed by the PCRA court in its February 25, 2015 opinion reflects our own.

Specifically, as to issue II. A., we agree that Appellant failed to establish ineffective assistance of counsel for trial and appellate counsel's purported failure to develop and preserve an issue relating to the victim's alleged sexual conduct with Appellant's son because counsel had a reasonable strategic reason for his conduct of the case. PCRA Court Opinion, 2/25/15, at 4-6.

As to issue II. B., we agree Appellant failed to establish ineffective assistance of counsel for trial counsel's purported failure to object to a witness' improper bolstering of victim's credibility. **Id.** at 7. The comment was not solicited by the Commonwealth, was fleeting, and resulted in no undue prejudice. **Id.**

As to issue II C, (1) and (2), we agree Appellant failed to establish ineffective assistance of counsel for trial counsel's purported failure to object

to purported hearsay statements. **Id.** at 8-9. The statements were either not hearsay or subject to a hearsay exception. **Id.**

As to Issue II. D., we share the PCRA court's conclusion that Appellant failed to establish ineffective assistance of counsel for trial counsel's purported failure to request an alibi instruction. **Id.** at 10-13. Appellant's alibi evidence was incomplete, and the instruction was not warranted. **Id.** Accordingly, Appellant was not prejudiced.

As to issue II. E., we are in accord with the PCRA court that Appellant failed to establish ineffective assistance of counsel for trial counsel's failure to request a bill of particulars to require the Commonwealth to more specifically identify the dates of the offenses. **Id.** at 14-15. When a course of conduct against a minor victim is alleged, reasonable flexibility is afforded the Commonwealth, which was not abused in this case. **Id.**

As to Issue II. F., we are of the same opinion as the PCRA court that Appellant failed to establish ineffective assistance of counsel for trial counsel's failure to request a lack of consent charge where Appellant denied the offending contact occurred. **Id.** at 16.

As to issue II. G., we agree Appellant failed to establish ineffective assistance of counsel for trial counsel's failure to present witnesses attacking complainant's veracity. **Id.** at 17. The proffered witnesses speak to specific instances not reputation, and their testimony would not be admissible for the

purpose advanced. Additionally, Appellant has not shown how he was prejudiced. ***Id.***

As to issue II. H., we concur that Appellant failed to establish ineffective assistance of counsel for trial counsel's failure to present a refutation of the home circumstances at the time of the crimes. ***Id.*** at 18. Appellant has not developed how such testimony would have altered the result, hence no prejudice is shown. ***Id.***

As to issue III. A., we share the PCRA court's determination that Appellant's "newly discovered evidence" is merely inadmissible hearsay regarding a matter of credibility and does not afford PCRA relief. ***Id.*** at 18-20.

Finally, as to issue I., we conclude that Appellant's legality of sentencing claim based on ***Alleyne v. U.S.***, 133 S. Ct. 2151 (2013) and ***Commonwealth v. Wolfe***, 106 A.3d 800 (Pa. Super. 2014), *appeal granted*, 121 A.3d 433 (Pa. 2015), is not subject to retroactive application through the PCRA where Appellant's judgment of sentence was final prior to the decision in ***Alleyne***. ***See Commonwealth v. Riggle***, 119 A.3d 1058 (Pa. Super. 2015).

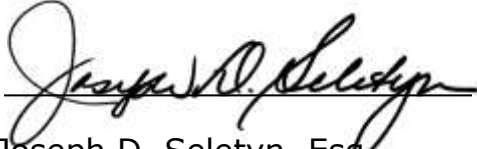
Accordingly, we adopt the February 25, 2015 opinion of the Honorable David F. Bortner as our own for the purposes of our disposition of this appeal. We conclude the PCRA court committed no error in determining Appellant's numerous issues were without merit. Accordingly, we affirm the

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PCRA court's February 25, 2015 order dismissing Appellant's amended PCRA petition.

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: 12/29/2015