NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. SANTOS LUIS RODRIGUEZ, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1020 MDA 2015

Appeal from the Order Entered June 5, 2015
in the Court of Common Pleas of Lancaster County
Criminal Division at No.: CP-36-CR-0005754-2010

BEFORE: BOWES, J., PANELLA, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.: **FILED JANUARY 13, 2016**

Appellant, Santos Luis Rodriguez, appeals from the order denying his counseled first petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541–9546, after a hearing. Appellant claims that his girlfriend and one-time co-defendant, who pleaded guilty to the same charges with which he was charged, is now willing to testify on his behalf; he asserts this constitutes after-discovered evidence, warranting a new trial. He also alleges the ineffectiveness of trial counsel. We affirm on the basis of the PCRA court opinion.

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* Retired Senior Judge assigned to the Superior Court.

In its opinion, the court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them at length here.

For context and convenience of reference, we note briefly that a jury convicted Appellant of aggravated assault, robbery, and criminal conspiracy.[1] Appellant's conviction arose out of the knife stabbing and robbery of the victim, Darnell Gonzalez.

There is no dispute that on the day in question, Gonzalez had consumed seven thirty-two ounce pitchers of Coors Light beer at a local bar and delicatessen.[2] Maria Rivera, Appellant's girlfriend, who had been sitting with him in the bar, approached Gonzalez and asked him for money. Gonzalez asked for sex. He testified that after some negotiation over price, lured by the proposition of sex with Rivera for money, he left the bar with her. In the alley behind the bar, Appellant stabbed Gonzalez from behind and demanded money. Gonzalez responded that he had none. Appellant and Rivera fled. Gonzalez managed to make his way home and call the police.

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[1] Appellant's conviction constituted a "second strike" offense, based on a prior conviction for manslaughter. (***See*** N.T. Sentencing, 3/02/12, at 13). The court sentenced him to an aggregate term of not less than twenty-four nor more than sixty years' incarceration in a state correctional institution. This Court affirmed the judgment of sentence. (***See Commonwealth v. Rodriguez***, 64 A.3d 291 (Pa. Super. 2013) (unpublished memorandum)).

[2] He was later found to have a blood alcohol content (BAC) of .292%.

Appellant and Rivera were arrested several hours later, when an investigating police officer spotted them and noticed their resemblance to the people in the surveillance video from the bar, including their clothing and the backpacks they had with them. The police found a knife in one of the backpacks, which they identified as the weapon used in the crime.

It is undisputed that in his initial report to the police Gonzalez lied about his negotiation with Rivera over sex for money. He later claimed that, as an undocumented alien, he feared that if he told the police he had solicited a prostitute, he would be deported. In any event, the interaction between Appellant, Rivera and Gonzalez in the bar was captured on the bar's surveillance video, which was authenticated by the owner and played to the jury at trial.[3]

Pertinent to the claims in this appeal, at trial defense counsel argued to the jury that the knife found in the backpack was clean, and had no blood on it, "not even a speck of blood, nothing, no blood. No blood on the knife." (N.T. Trial, 1/04/12, at 85).

Also at trial, in final argument, the prosecutor alluded to the surveillance video, as showing that Appellant was acting in concert with Rivera. He argued further that Rivera was "working Mr. Gonzalez hard,"

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[3] There was no audio to accompany the video.

while Gonzalez was "sort of minding his own business." (N.T. Trial, 1/05/12, at 339-40).

Noting that Rivera had already left the bar (and returned) several times, the prosecutor added, "[I]t looks like she's saying this is your last chance[.]" (***Id.*** at 340).[4] Appellant maintains on appeal that this comment was "complete speculation" and defense counsel was ineffective for not objecting to it. (Appellant's Brief, at 23 (citing N.T. Trial, 1/05/12, at 340); ***see also id.*** at 340-41).

On November 16, 2011, Rivera entered a guilty plea to the same offenses charged against Appellant. (***See*** PCRA Court Opinion, 6/05/15, at 5). After this Court affirmed his judgment of sentence, Appellant filed the instant PCRA petition. The PCRA court appointed counsel, who filed an amended petition, which the court denied, after a hearing. (***See*** Opinion and Order, 6/05/15). This timely appeal followed.[5]

Appellant raises four questions on appeal:

> A. Whether the [PCRA] court erred in denying [Appellant's] amended PCRA when the testimony of Maria de Los Angeles

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[4] Appellant's quotation is incomplete. The full sentence reads as follows: "There's even a time towards the end of that thing where she's at the bar with the door open and she's like basically almost as if — it looks like she's saying this is your last chance and he's sitting there." (N.T. Trial, 1/05/12, at 340).

[5] The PCRA court filed an order on June 17, 2015, referencing its opinion filed on June 5, 2015. (***See*** Order, 6/17/15); ***see also*** Pa.R.A.P. 1925(a). The court did not order a statement of errors. ***See*** Pa.R.A.P. 1925(b).

Rivera constituted after discovered exculpatory evidence justifying the award of a new trial under 42 Pa.C.S.A. § 9543(a)(2)(vi)?

B. Whether the [PCRA] court erred in denying [Appellant's] amended PCRA [petition] when trial counsel was ineffective by failing to file a meritorious motion challenging the weight of the evidence?

C. Whether the [PCRA] court erred in denying [Appellant's] amended PCRA [petition] when trial counsel was ineffective by failing to argue to the jury that the knife which the Commonwealth claimed was the assault weapon did not have any blood on it?

D. Whether the [PCRA] court erred in denying [Appellant's] amended PCRA [petition] when trial counsel was ineffective by failing to object and move for a mistrial when the prosecutor made an improper argument which was speculative and contained his personal opinion concerning the credibility of the evidence presented?

(Appellant's Brief, at 4).

Our standard and scope of review for the denial of a PCRA petition is well-settled.

> [A]n appellate court reviews the PCRA court's findings of fact to determine whether they are supported by the record, and reviews its conclusions of law to determine whether they are free from legal error. The 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 trial level.

Commonwealth v. Spotz, 84 A.3d 294, 311 (Pa. 2014) (citations and internal quotation marks omitted).

> To establish trial counsel's ineffectiveness, a petitioner must demonstrate: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action or inaction chosen; and (3) counsel's action or inaction prejudiced the petitioner. ***See Strickland v. Washington***, 466 U.S. 668, 104 S. Ct.

> 2052, 80 L.Ed.2d 674 (1984); ***Commonwealth v. Pierce,*** 515 Pa. 153, 527 A.2d 973 (1987).

Id. at 303 n. 3. Furthermore,

> [A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the 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. 42 Pa.C.S. § 9543(a)(2)(ii). Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him.

Id. at 311–12 (most case citations, internal quotation marks and other punctuation omitted). "Counsel's assistance is **deemed constitutionally effective** once this Court determines that the defendant has not established any one of the prongs of the ineffectiveness test." ***Commonwealth v. Rolan***, 964 A.2d 398, 406 (Pa. Super. 2008) (citations and internal quotation marks omitted) (emphasis in original). Additionally,

> [Our Supreme] Court has recognized that counsel are not constitutionally required to forward any and all possible objections at trial, and the decision of when to interrupt oftentimes is a function of overall defense strategy being brought to bear upon issues which arise unexpectedly at trial and require split-second decision-making by counsel. Under some circumstances, trial counsel may forego objecting to an objectionable remark or seeking a cautionary instruction on a particular point because objections sometimes highlight the issue for the jury, and curative instructions always do.

Commonwealth v. Koehler, 614 Pa. 159, 36 A.3d 121, 146 (2012) (case citations, internal quotation marks and other punctuation omitted). This Court analyzes PCRA appeals "**in the light most favorable to the prevailing party at the PCRA level.**" ***Rykard***, ***supra*** at 1183 (emphasis added); ***see also Spotz***, ***supra*** at 311 ("The 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 trial level.**") (emphasis added).
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> Our Supreme Court has explained:
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> "As a general and practical matter, it is more difficult for a defendant to prevail on a claim litigated through the lens of counsel ineffectiveness, rather than as a preserved claim of trial court error." ***Commonwealth v. Gribble***, 580 Pa. 647, 863 A.2d 455, 472 (2004). This Court has addressed the difference as follows:
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> [A] defendant [raising a claim of ineffective assistance of counsel] is required to show actual prejudice; that is, that counsel's ineffectiveness was of such magnitude that it 'could have reasonably had an adverse effect on the outcome of the proceedings.' ***Pierce***, 515 Pa. at 162, 527 A.2d at 977. . . . In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. ***Pierce***, ***supra***.
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> ***Gribble***, 580 Pa. at 676, 863 A.2d at 472 (emphasis in original). ***Id.*** at 315.

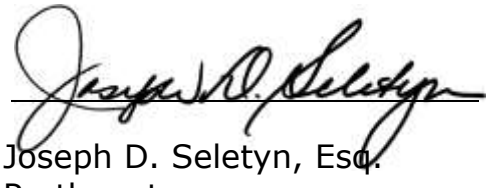
Commonwealth v. Freeland, 106 A.3d 768, 775-76 (Pa. Super. 2014).

Here, after a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the PCRA court we conclude that there is no merit to the issues Appellant has raised on appeal. The PCRA court opinion properly disposes of the questions presented. (***See*** PCRA Ct. Op., 6/05/15, at 4-10) (concluding that: (1) PCRA court properly denied petition based on proposed testimony from accomplice Rivera where Rivera had previously pleaded guilty to same charges she now proposed to deny; evidence is not newly discovered since Appellant would have known of Rivera's proposed testimony, because their consistent position had been that

they left the bar together but separately from Gonzalez; and Appellant failed to prove outcome would likely have been different, as Commonwealth could have cross-examined Rivera about her denial based on contradictory statements at her guilty plea proceedings; (2) Appellant failed to prove meritorious weight claim by preponderance of the evidence, and jury finding that victim's testimony was credible did not shock conscience of the court; defense counsel was not ineffective for declining to raise meritless claim; (3) claim that defense counsel was ineffective for failure to argue knife had no blood on it was contradicted by the record which confirms that defense counsel argued vigorously that knife had no blood on it; and (4) prosecutor's observation about surveillance video was permissible fair comment on evidence, and defense counsel had reasonable basis for declining to object). Accordingly, we affirm on the basis of the PCRA court's opinion.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/13/2016