

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

PAUL OSCAR ALTMANN

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1613 EDA 2015

Appeal from the PCRA Order May 8, 2015
In the Court of Common Pleas of Wayne County
Criminal Division at No(s): CP-64-CR-0000419-2011

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

MEMORANDUM BY MUNDY, J.:

FILED FEBRUARY 01, 2016

Appellant, Paul Oscar Altmann, appeals *pro se* from the May 8, 2015 order dismissing without a hearing, Appellant's timely first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

We summarize the pertinent procedural history of this case as follows. On January 19, 2012, following a jury trial, at which Appellant represented himself with appointed standby counsel, a jury found Appellant guilty of aggravated assault and simple assault.¹ Following the denial by operation of law of his post-sentence motions, Appellant filed a timely counseled notice of appeal challenging the trial court's decision to permit Appellant to represent

¹ 18 Pa.C.S.A. §§ 2702(a)(4), and 2701(a)(2), respectively.

himself as well as challenging the sufficiency and the weight of the evidence. On November 6, 2013, this Court affirmed Appellant's judgment of sentence, and our Supreme Court denied Appellant's petition for allowance of appeal on April 16, 2014. ***Commonwealth v. Altmann***, 91 A.3d 1274 (Pa. Super. 2012) (unpublished memorandum), *appeal denied*, 89 A.3d 1282 (Pa. 2014).

On May 16, 2014, Appellant filed a timely *pro se* PCRA petition. On December 19, 2014, the PCRA court appointed counsel to represent Appellant. On March 16, 2015, PCRA counsel filed a motion to withdraw, together with a letter in accordance with the procedures prescribed by ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*), concluding Appellant's issues were meritless. On March 26, 2015, the PCRA court filed a notice, pursuant to Pennsylvania Rule of Criminal Procedure 907, of its intent to dismiss Appellant's *pro se* PCRA petition without a hearing. Therein the PCRA court also granted PCRA counsel's motion to withdraw. Appellant filed a response objecting to the PCRA court's notice on April 20, 2015. Appellant filed a further response on May 1, 2015, alleging the ineffectiveness of PCRA counsel. The PCRA court dismissed Appellant's *pro se* PCRA petition by order filed May 8, 2015.

Appellant filed a timely *pro se* notice of appeal on June 1, 2015. Although not ordered to do so, Appellant filed a concise statement of errors

complained of on appeal contemporaneously with his notice of appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On June 12, 2015, the PCRA court filed its Rule 1925(a) opinion wherein it incorporated its statement of reasons filed as part of its March 26, 2015 Rule 907 notice.

On appeal, Appellant raises the following issues for our review.

I. Whether initial PCRA counsel rendered ineffective assistance [sic] of counsel based on the filing of a **Turner/Finley** “no-merit” letter [] and the Superior Court should disapprove the [PCRA] court’s adoption of appointed PCRA counsel’s **Finley** “no-merit” letter analysis and reasoning []and[] remand this matter to the PCRA court for a proper rule 1925 (a) opinion in reference to the following sub-claims?

a. Violation of Appellant’s right to a fair trial under the U.S. Constitution VI Amendment, [and] Article 1, §9 of the Pa. Constitution;

b. Ineffective assistance of counsel on appeal;

c. Judicial misconduct during trial court proceeding;

d. District attorney committed prosecution [sic] misconduct for knowingly presenting perjured [sic] testimony from Commonwealth witness; &

e. Prosecutorial [sic] misconduct.

II. Whether the PCRA court erred and denied Appellant his federal and state constitutional rights to due process of law by dismissing Appellant’s initial PCRA petition without a hearing and adopting appointed counsel’s **Finley** “no-merit” letter to withdraw, in violation of Pa.R.Crim.P. 904(f)(2) and

908(a)(2) [] where the Appellant raised substantial questions of disputed facts?

Appellant's Brief at 4.

We initially reiterate our well-established standard of review. "Our standard of review of [an] order granting or denying relief under the PCRA requires us to determine whether the decision of the PCRA court is supported by the evidence of record and is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Melendez-Negron***, 123 A.3d 1087, 1090 (Pa. Super. 2015) (citation omitted).

To be entitled to PCRA relief, appellant must establish, by a preponderance of the evidence, his conviction or sentence resulted from one or more of the enumerated errors in 42 Pa.C.S. § 9543(a)(2), his claims have "not been previously litigated or waived[,] and "the failure to litigate the issue prior to or during trial, ... or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." ***Id.***, § 9543(a)(3)-(4). An issue is previously litigated if "the highest appellate court in which [appellant] could have had review as a matter of right has ruled on the merits of the issue[.]" ***Id.***, § 9544(a)(2). An issue is waived if appellant "could have raised it but failed to do so before trial, at trial, ... on appeal or in a prior state post [-]conviction proceeding." ***Id.***, § 9544(b).

Commonwealth v. Fears, 86 A.3d 795, 803-804 (Pa. 2014).

In this case, because the PCRA court dismissed Appellant's petition without first conducting a hearing, we note the following.

[A] petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a

hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings. A reviewing court on appeal must examine each of the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and in denying relief without an evidentiary hearing.

Commonwealth v. Smith, 121 A.3d 1049, 1052 (Pa. Super. 2015)

(internal quotation marks and citations omitted).

Instantly, Appellant alleges standby counsel, appellate counsel and PCRA counsel provided ineffective assistance during their respective tenures of representation. Appellant's Brief at 21, 23, 28.

To be entitled to relief on an ineffectiveness claim, a PCRA petitioner must establish: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's action or failure to act; and (3) he suffered prejudice as a result of counsel's error, with prejudice measured by whether there is a reasonable probability the result of the proceeding would have been different. ***Commonwealth v. Chmiel***, 612 Pa. 333, 30 A.3d 1111, 1127 (2011) (employing ineffective assistance of counsel test from ***Commonwealth v. Pierce***, 515 Pa. 153, 527 A.2d 973, 975-76 (1987)). Counsel is presumed to have rendered effective assistance. Additionally, counsel cannot be deemed ineffective for failing to raise a meritless claim. Finally, because a PCRA petitioner must establish all the ***Pierce*** prongs to be entitled to relief, we are not required to analyze the elements of an ineffectiveness claim in any specific order; thus, if a claim fails under any required element, we may dismiss the claim on that basis.

Commonwealth v. Treiber, 121 A.3d 435, 445 (Pa. 2015) (footnote omitted; some citations omitted).

Preliminarily we address Appellant's attempt to invoke the ineffectiveness of his trial standby counsel. Acknowledging he cannot invoke his own ineffectiveness for his self-representation at trial, Appellant nevertheless asserts "[t]he fact that stand-by [c]ounsel was appointed to assist Appellant alters this conclusion, in that stand-by counsel can be sighted [sic] for ineffective assistance of [c]ounsel essentially for allowing" a trial error to occur. Appellant's Brief at 28. Appellant is mistaken.

Respecting standby counsel, this Court has recognized that when a defendant elects to proceed at trial *pro se*, the defendant, and not standby counsel, is counsel of record and is responsible for trying the case. The limited role of standby counsel is essential to satisfy the United States Supreme Court's directive that a defendant's choice to proceed *pro se* must be honored out of that respect for the individual which is the lifeblood of the law even when the defendant acts to his own detriment. This understanding undergirds our jurisprudence, which dictates that a defendant who chooses to represent himself cannot obtain post-conviction relief by raising a claim of his own ineffectiveness **or that of standby counsel**. Here, Appellant's post-conviction attempt to challenge standby counsel's effectiveness at trial, for allegedly permitting him to invalidly waive [important rights] is not cognizable.

Commonwealth v. Blakeney, 108 A.3d 739, 756-757 (Pa. 2014) (internal quotation marks and citations omitted; emphasis added), *cert denied*, ***Blakeney v. Pennsylvania***, 135 S. Ct. 2817 (2015).

Appellant's averments of ineffective assistance of counsel relative to direct-appeal counsel center on counsel's purported failure to adequately recognize, preserve, and present certain meritorious claims for direct appeal.

Appellant's second PCRA claim asserted claims of ineffective [sic] assistance of Appeal Counsel wherefore Appellant asserted that Appeal Counsel failed to raise an issue of Judicial misconduct based on biased statements made by the Trial Court, along with a second issue of failure of the juror selection process relating to questionnaire review and the ability of Appellant to ask questions during *voir dire*.

Appellant's Brief at 23. Appellant also contends his appointed PCRA counsel was ineffective.² Specifically, Appellant argues "[PCRA] Counsel [] failed to conduct a complete meaningful review of the records and applicable case law." **Id.** at 15. "A review of the [PCRA] court [r]ecords reveals that [PCRA] [c]ounsel['s] [] 'no-merit' [l]etter failed to substantially comply with the [] **Turner/Finley** [] requirements.... Appellant asserts that the nature and extent of [a]ppointed PCRA [c]ounsel['s] [] review can only be described as cryptic." **Id.** at 21.

The PCRA court determined Appellant failed to make out a claim for ineffective assistance of direct appeal counsel relative to the conduct of jury

² Appellant preserved this issue for appeal by raising the same in his second response to the PCRA court's Rule 907 notice and by including the issue in his Rule 1925(b) concise statement. **See Commonwealth v. Henkle**, 90 A.3d 16, 24-25 (Pa. Super. 2014) (*en banc*) (holding claims of PCRA counsel ineffectiveness must be presented in the first instance before the PCRA court, for example in a response to a Rule 907 notice, and may not be raised for the first time on appeal), *appeal denied*, 101 A.3d 785 (Pa. 2014).

selection because the underlying claim was waived and without merit. PCRA Court Opinion and Rule 907 Notice, 3/26/15, at 4-5. We agree.

First, Appellant specifically contends that the Prothonotary's office failed to supply him with copies of the juror questionnaires prior to jury selection and that he subsequently discovered several jurors gave oral responses during *voir dire* that contradicted their responses on the questionnaires. Appellant's Brief at 27-28.

[B]ecause Appellant was representing himself during *voir dire*, he was not provided with information provided by the [j]urors on the questionnaires, thus stifling his ability to ascertain, by proper examination at the time the [j]ury was impaneled, the existence of any reasons for objection to the [j]urors until after [t]rial.

Id.

As the PCRA court notes, Appellant does not articulate how he was prevented by the Prothonotary from accessing and copying the juror questionnaires prior to jury selection. Furthermore, Appellant was aware of the existence of the juror questionnaires during *voir dire*, because they were specifically referenced by the Commonwealth. N.T., 1/17/12, at 19. Nevertheless, Appellant did not object or otherwise raise the issue of his alleged lack of access to the questionnaires at any time during *voir dire*, trial

or sentencing.³ Consequently, Appellant had waived the issue for the purpose of direct appeal. **See Commonwealth v. Smith**, 17 A.3d 873, 894 (Pa. 2011) (holding defendant waived challenge to alleged improprieties during *voir dire* by failing to timely object). Moreover, the juror questionnaires are not an end in themselves but are a potential aid to *voir dire* questioning by the trial court and parties.

The Rules of Criminal Procedure permit trial courts to use juror information questionnaires in conjunction with the examination of prospective jurors. The comments to the Rules indicate that the questionnaire serves to facilitate and expedite *voir dire* and that it is to be used as an aid in the oral examination of jurors. The comments explain that the questionnaires, which provide the judge and attorneys with basic background information about the jurors, eliminate the need for many commonly asked questions but are to be used in conjunction with and not as a substitute for oral examination.

Commonwealth v. Ellison, 902 A.2d 419, 424 (Pa. 2006). Instantly, Appellant was afforded an opportunity to question the jurors during *voir dire*, but declined to do so. N.T., 1/17/12, at 22.

Finally, we note the alleged answers some jurors made on their questionnaires relative to an inclination to believe statements from police officers because of their professional position is not *per se* contradictory to their responses during *voir dire* that they could be impartial and follow the

³ Appellant also appears to claim, somewhat contradictorily, that the “juror information was incomprehensible,” but again raised no objection before the trial court. Appellant’s Brief at 34.

trial court's instructions, including that no special deference is to be given to testimony from a police officer merely because of such professional position. Accordingly, Appellant's claim that his issue was not waived because of being misled by a juror is inapt. **See** Appellant's Brief at 34, *citing Commonwealth v. Didyoung*, 535 A.2d 192, 193 (Pa. Super. 1988).

Because Appellant's underlying claim was waived and without merit, direct-appeal counsel cannot be considered ineffective for not raising the issue on direct appeal. **See Treiber, supra**. Additionally, PCRA counsel cannot be deemed ineffective for concluding the issue is meritless as a PCRA issue, where the underlying issue was waived, Appellant could not raise his own ineffectiveness or that of standby counsel, and direct-appeal counsel was not ineffective. **See id.; Blakeney, supra; Fears, supra**.

Appellant asserts that direct-appeal counsel was also ineffective for failing to raise an issue of judicial misconduct, which Appellant described as "(a) the Court yelled during Jury selection that [Appellant] should have an [a]ttorney; and (b) the Court interjected on behalf of the Commonwealth again during Jury selection, acting essentially as its advocate." Appellant's Brief at 29. Appellant offers no analysis beyond this bald assertion of what the comments were, where in the record they appear, or how they prejudiced Appellant. Our review of the transcript of the jury selection proceeding discloses no inappropriate comments or conduct by the trial court. Accordingly, we conclude Appellant's issue is completely unsupported

and without merit. As the issue lacks merit, neither direct appeal counsel nor PCRA counsel can be deemed ineffective for failing to advance the issue.

See Treiber, supra; Blakeney, supra; Fears, supra.

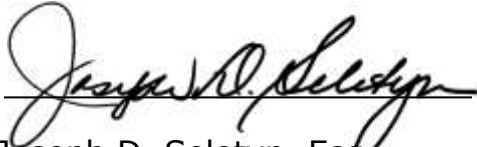
Similar to his treatment of his judicial misconduct claim, Appellant does not provide specific analysis of his bald claims of prosecutorial misconduct. We agree with the PCRA court that Appellant's allegation of perjured testimony is simply an attempt to revisit a previously litigated challenge to the sufficiency and weight of the evidence. ***See*** PCRA Court Opinion and Rule 907 Notice, 3/26/15, at 8. Further, Appellant does not identify the alleged misconduct of the prosecutor during closing argument or how he was prejudiced thereby. Accordingly, we conclude these issues lack sufficient merit to support Appellant's allegations of ineffective assistance of either direct-appeal counsel or PCRA counsel. ***See Treiber, supra; Blakeney, supra; Fears, supra.***

In his second issue, Appellant claims the PCRA court erred in failing to hold a hearing, as he established genuine issues of material fact. Appellant's Brief at 43. Our previous discussion belies Appellant's claim. His bald unsupported assertions do not entitle him to a hearing in this case. ***See Smith, supra.*** Accordingly, we conclude the PCRA court did not abuse its discretion in concluding Appellant failed to present any genuine issue of material fact, and in dismissing Appellant's *pro se* PCRA petition without a hearing.

Based on the foregoing, we conclude all of Appellant's issues are devoid of merit. Therefore, we affirm the PCRA court's May 8, 2015 order.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016