**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | |
| EDDY COLON | |
| Appellant | No. 3833 EDA 2015 |

Appeal from the PCRA Order November 19, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007287-2009

BEFORE: GANTMAN, P.J., PANELLA, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J. **FILED AUGUST 22, 2017**

Appellant, Eddy Colon, appeals from the order dismissing his petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546, without a hearing. Colon alleges that he was entitled to an evidentiary hearing, and ultimately a new trial, due to trial counsel's ineffectiveness. After careful review, we conclude that none of Colon's allegations of ineffectiveness have merit, and therefore affirm.

A prior panel of this Court summarized the relevant factual and procedural history as follows:

> According to the evidence, on January 15, 2009, Philadelphia Police Officer James Crown and other officers were in the area of the 3800 block of Bennington Avenue when Officer Crown observed a man named Edwin Avila engage in several hand-to-

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* Retired Senior Judge assigned to the Superior Court.

> hand transactions. When police pulled up Avila retreated down an alley and as he did so, he discarded two packets of a green weedy substance and a bag filled with 40 purple pills stamped with "[G] 163." Avila then ran into a residence located at 3845 Bennington Avenue and police followed him inside the location.
>
> Upon entering the property, Officer Crown saw [Colon] exiting a second floor bathroom. Officer Crown and the other officer explained to [Colon] why they were in the residence at which time [Colon] consented to a search of the premises. As a result of that search police recovered several pill bottles filled with different pills testing later revealed to be Oxycodone, amphetamines, codeine, and alpaprazolam [sic].[1] One of the pills confiscated by police matched the pills discarded by Avila.
>
> In addition thereto, police seized $1378.00 which was comprised of bills of small denomination, which [Colon] admitted was his, as well as indicia of residency for [Colon]. Police also found a log book containing a list of names next to which were the names of the drugs found inside the residence and amounts of money.
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> [Colon] stipulated to the testimony of a drug expert who, had he testified, would have opined that the [drugs] were possessed with the intent to deliver.
>
> Following a nonjury trial, the trial court convicted [Colon] of [possession of a controlled substance, possession with intent to deliver ("PWID"), possession of paraphernalia, and criminal conspiracy.] On August 4, 2011, the trial court denied [Colon's] motion for extraordinary relief wherein [Colon] apparently invoked his trial counsel's failure to advise him of his right to testify on his own behalf. In denying the motion, the trial court reasoned that it was a matter for collateral review and that special relief was inappropriate. On the same date, the trial court imposed ten years[']  imprisonment for PWID and five years of

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[1] Officer Crown testified that an unidentified third party, a woman who entered the residence during the police search, claimed ownership of some of the prescription medication; however, police discounted her claims because the prescription bottles did not bear her name.

> probation for criminal conspiracy. The Court imposed no further penalties on the remaining offenses.

***Commonwealth v. Colon***, 2291 EDA 2011, at 1-2 (Pa. Super., filed Feb. 15, 2013) (unpublished memorandum) (internal quotation marks and citations to the record omitted) (quoting Trial Court Opinion, 1/26/12, at 1-2). Colon filed an appeal in which he challenged the trial court's failure to notify him of his right to testify on his own behalf as well as the sufficiency of the evidence. A panel of this Court affirmed his judgment of sentence. Our Supreme Court denied his petition for permission to appeal on August 28, 2013.

On August 10, 2014, Colon filed a *pro se* PCRA petition, alleging trial counsel's ineffective assistance in failing to pursue a suppression motion and for failing to allow Colon to testify at trial. The PCRA court appointed counsel, who filed a motion to withdraw and a no-merit letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1998), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). The PCRA court granted counsel's petition to withdraw and issued Rule 907 notice of intent to dismiss Colon's petition without a hearing. Colon retained new counsel and filed a response to the PCRA court's Rule 907 notice. The PCRA court subsequently dismissed Colon's petition, without granting a hearing. Colon timely appealed.

"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.***

***Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted). On questions of law, our scope of review is de novo. ***See id***.

All of Colon's issues on appeal assert the ineffective assistance of trial counsel. ***See*** Appellant's Brief, at 3. We presume counsel provided effective assistance; Colon has the burden of proving otherwise. ***See Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa. Super. 2004). "In order for [an a]ppellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, ineffective assistance of counsel which … so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth v. Johnson***, 868 A.2d 1278, 1281 (Pa. Super. 2005) (citation omitted). Further,

> [an a]ppellant must plead and prove by a preponderance of the evidence that: (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) [a]ppellant suffered prejudice because of counsel's action or inaction.

***Commonwealth v. Spotz***, 18 A.3d 244, 260 (Pa. 2011) (citations omitted). A failure to satisfy any prong of the test will require rejection of the claim. ***See Commonwealth v. Spotz***, 84 A.3d 294, 311 (Pa. 2014).

"Arguable merit exists when the factual statements are accurate and could establish cause for relief. Whether the facts rise to the level of arguable merit is a legal determination." ***Commonwealth v. Barnett***, 121 A.3d 534, 540 (Pa. Super. 2015) (citations and internal quotation marks omitted). "Prejudice is established if there is a reasonable probability that,

but for counsel's errors, the result of the proceedings would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." ***Commonwealth v. Stewart***, 84 A.3d 701, 707 (Pa. Super. 2013) (*en banc*) (citations and internal quotation marks omitted).

Colon's first claim is that trial counsel was ineffective for failing to litigate a suppression motion relating to the warrantless search of his residence. ***See*** Appellant's Brief, at 3, 14-21. Colon contends the police illegally entered his residence, rendering his subsequent consent to search the premises void.[2] ***See id***. As such, Colon alleges a suppression motion would have been successful and that it was objectively unreasonable and prejudicial for trial counsel to fail to pursue this motion. ***See id***.

> [T]he failure to file a suppression motion under some circumstances may be evidence of ineffective assistance of counsel. However, if the grounds underpinning that motion are without merit, counsel will not be deemed ineffective for failing to so move. [T]he defendant must establish that there was no reasonable basis for not pursuing the suppression claim and that if the evidence had been suppressed, there is a reasonable probability the verdict would have been more favorable.

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[2] The assessment of a warrantless search is comprised of two inquiries: "first, whether there existed probable cause to search; and secondly, whether exigent circumstances can be found to excuse the obtaining of the warrant." ***Commonwealth v. Wright***, 961 A.2d 119, 137 (Pa. 2008). Colon only challenges the "exigent circumstances" prong. ***See*** Appellant's Brief, at 17. We limit our review to that issue.

***Commonwealth v. Watley***, 153 A.3d 1034, 1044 (Pa. Super. 2016) (citations and internal quotation marks omitted; brackets added and brackets in original).

Here, the Commonwealth and PCRA court contend that Colon's claim of ineffectiveness fails because his suppression claim is meritless. ***See*** Commonwealth's Brief, at 7; PCRA Opinion, 9/29/16, at 6-9. Specifically, the PCRA court found there were exigent circumstances sufficient to justify warrantless entry into the residence as the police were in hot pursuit of a fleeing felon, had probable cause to arrest Avila, found Avila in the residence, and reasonably believed that Avila would destroy the evidence. ***See id***. Further, the PCRA court highlighted two United States Supreme Court cases, ***United States v. Santana***, 427 U.S. 38 (1976), and ***Warden***, ***Maryland Penitentiary v. Hayden***, 387 U.S. 294 (1967) (as applied in ***Commonwealth v. Dennis***, 612 A.2d 1014 (Pa. Super. 1992)), to demonstrate that the hot pursuit factor heavily weighs in favor of the legality of a warrantless entry. ***See id***.

Colon disputes the application of "the hot pursuit exception" to the warrant requirement in this matter as he contends that this "exception … is only applicable when pursuing officers *actually see* what residence the fleeing felon entered." Appellant's Brief, at 17.

Both the Pennsylvania and United States Constitutions protect citizens from unreasonable searches and seizures. ***See*** United States Constitution

Amendment 4; Pennsylvania Constitution Article 1, § 8. "The protection against unreasonable searches and seizures afforded by the Pennsylvania Constitution is broader than that under the Federal Constitution." ***Commonwealth v. Dean***, 940 A.2d 514, 520 (Pa. Super. 2008) (citations omitted).

"[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." ***Payton v. New York***, 445 U.S. 573, 590 (1980). Without exigent circumstances, a private home may not be entered to make an arrest even where probable cause exists. ***See Commonwealth v. Walker***, 836 A.2d 978, 981 (Pa. Super. 2003).

There are a number of factors to consider in determining whether exigent circumstances exist to justify a warrantless entry of a home. These include:

> (1) the gravity of the offense; (2) whether there is a reasonable belief that the suspect is armed; (3) whether there is a clear showing of probable cause; (4) whether there is a strong showing that the suspect is within the premises to be searched; (5) whether there is a likelihood that the suspect will escape; (6) whether the entry was peaceable; (7) the time of the entry, *i.e.*, day or night; (8) whether the officer was in hot pursuit of a fleeing felon; (9) whether there is a likelihood that evidence may be destroyed; and (10) whether there is a danger to police or others.

***Id***. (citation omitted).

Further,

> hot pursuit of a fleeing felon sufficient to create exigent circumstances for constitutional purposes requires a showing that the need for prompt police action is imperative, either because the evidence sought to be preserved is likely to be destroyed or secreted from investigation, or because the officer must protect himself from danger….

***Commonwealth v. Lee***, 972 A.2d 1, 5 (Pa. Super. 2009) (citations and internal quotations omitted).

Colon's entire suppression argument hinges upon his belief that the hot pursuit "exception … is only applicable when pursuing officers *actually see* what residence the fleeing felon entered." Appellant's Brief, at 17. He draws this conclusion from the fact that the police "officers in both [cases relied upon by the PCRA court] ***Santana*** and ***Hayden***[,] saw the fleeing felons enter particular houses and this fact was critical to the Supreme Court's holding in both cases." ***Id***., at 17-18. However, this statement not only misstates the factual basis underlying ***Hayden***,[3] but Colon's interpretation of these cases improperly implies that the United States Supreme Court has held that officers cannot rely on their hot pursuit of a fleeing felon to make a warrantless entry in situations where they do not personally visualize which residence the accused entered. Neither of these cases set forth this rule.

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[3] A cab driver, not a police officer, witnessed the defendant enter a home and alerted police. ***See Hayden***, 387 U.S. at 297. The police arrived at the home within minutes, and acting upon this information, entered the residence described by the cab driver. ***See id***.

Therefore, we agree with the PCRA court and Commonwealth that any suppression motion advanced on this theory, would be meritless. Thus, trial counsel could not be deemed ineffective for failing to file a suppression motion. ***See Watley***.

Next, Colon asserts that trial counsel interfered with his constitutional right to testify on his own behalf at trial. ***See*** Appellant's Brief, at 3, 22-26. Specifically, Colon alleges "he informed trial counsel that he wanted to testify in his own defense, but that trial counsel ignored his request and never called him as a witness." ***Id***., at 22. As this allegation created issues of material fact regarding trial counsel's strategy, Colon maintains the PCRA court should have granted an evidentiary hearing. ***See id***.

We have previously held that the decision to testify in one's own behalf

> is ultimately to be made by the accused after full consultation with counsel. In order to support a claim that counsel was ineffective for "failing to call the appellant to the stand," [the appellant] must demonstrate either that (1) counsel interfered with his client's freedom to testify, or (2) counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf.

***Commonwealth v. Thomas***, 783 A.2d 328, 334 (Pa. Super. 2001) (citation omitted; brackets in original).

But "[a] claim of strategic error absent a showing of specific incidents of counsel's impropriety will not satisfy this standard." ***Commonwealth v. Preston***, 613 A.2d 603, 605 (Pa. Super. 1992). This is because "[c]laims of ineffectiveness cannot be raised in a vacuum. This Court will not consider

claims of ineffectiveness without some showing of factual predicate upon which counsel's assistance may be evaluated." ***Thomas***, 783 A.2d at 333. ***See also Commonwealth v. Jones***, 811 A.2d 994, 1003 (Pa. 2002) ("Claims of ineffective assistance of counsel are not self-proving[.]")

Here, despite his contention in his appellate brief, Colon's PCRA petition lacked any allegations of a specific instance in which trial counsel interfered with Colon's freedom to testify or unreasonably advised Colon not to testify. Colon's only allegations to support his claim that trial counsel was ineffective in this regard are that "[t]he trial transcripts show that at no time did trial counsel ever consult with [Colon] regarding his right to testify," and that "[t]here is record support of [Colon's] allegation that he wished to testify at trial." PCRA petition, 4/10/14, at 5-6. Even assuming this information is correct, it does not logically follow that trial counsel *prevented* Colon from testifying, or that trial counsel *unreasonably advised* Colon not to testify. Colon simply never pled that in his petition. And without "some showing of factual predicate upon which counsel's assistance may be evaluated," we cannot properly evaluate this claim of ineffectiveness. ***Thomas***, 783 A.2d at 333.

Furthermore, even if Colon had noted specific instances of trial counsel's actions that prevented him from testifying, Colon cannot prove that trial counsel's alleged actions prejudiced him. As the PCRA court stated,

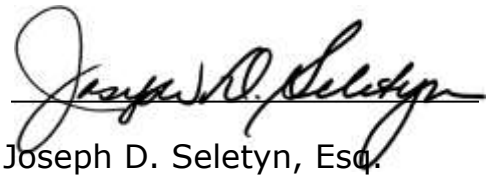
> [i]n his *pro se* petition, [Colon] asserts that had trial counsel not interfered with his right to testify, he would have told the [trial c]ourt that the drugs were not his, which he states is confirmed

> by the record, which indicates that a woman entered the residence after the police had and claimed that the drugs were hers. [The trial c]ourt denied this claim because the record shows that none of the drugs in the prescription bottles contained her name. It also denied the claim because the verdict would have been the same even had [Colon] testified given the overwhelming evidence of his guilt. The evidence showed that he resided inside the residence and that the contraband was in plain view. Given those facts, [Colon's] proposed testimony would have been of no avail.

PCRA Court Opinion, 9/29/16, at 11 (citations to the record omitted; italics added). The record supports the PCRA court's reasoning. And, importantly, the PCRA court sat as the finder-of-fact at the bench trial in this matter.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/22/2017