

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MICHAEL DAVID RUTH,

Appellant

IN THE SUPERIOR COURT  
OF  
PENNSYLVANIA

No. 411 EDA 2017

Appeal from the PCRA Order Entered January 23, 2017  
In the Court of Common Pleas of Montgomery County  
Criminal Division at No(s): CP-46-CR-0008965-2011

BEFORE: BENDER, P.J.E., LAZARUS, J., and KUNSELMAN, J.

MEMORANDUM BY BENDER, P.J.E.:

**FILED MAY 29, 2018**

Appellant, Michael David Ruth, appeals from the post-conviction court's January 23, 2017 order denying his first petition under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546. After careful review, we affirm.

The PCRA court briefly summarized the facts and procedural history of Appellant's case, which we need not reproduce herein. **See** PCRA Court Opinion (PCO), 3/29/17, at 1-2. On appeal, Appellant presents the following four claims of ineffective assistance of his trial counsel:

Did the [PCRA] [c]ourt err in denying Appellant's [p]etition for [p]ost-[c]onviction [r]elief where it:

- a) Found that [t]rial [c]ounsel was not ineffective for failing to call any [c]haracter [w]itnesses to testify [to] Appellant's reputation for truthfulness and honesty and/or his reputation as a peaceful and law abiding person?

- b) Found that [t]rial [c]ounsel was not ineffective for calling a [d]efense [w]itness who had previously suffered a conviction for a crimen falsi offense; along with a conviction for the offense of [p]ossession [w]ith the [i]ntent to [d]eliver a [c]ontrolled [s]ubstance, a crime substantially similar to that for which Appellant was being tried?
- c) Found that [t]rial [c]ounsel was not ineffective for calling a [d]efense [e]xpert [w]itness, who was wholly unfamiliar with the facts and circumstances of Appellant's case, to refute the Commonwealth's [e]xpert [w]itness?
- d) Found that [t]rial [c]ounsel was not ineffective for allowing [l]ead [t]rial [c]ounsel, Gregory R. Noonan, ... to make the trial strategy decisions for Appellant, at a time that [Noonan] was abusing controlled substances?

Appellant's Brief at 5.

First, "[t]his Court's standard of review from the grant or denial of post-conviction relief is limited to examining whether the lower court's determination is supported by the evidence of record and whether it is free of legal error." **Commonwealth v. Morales**, 701 A.2d 516, 520 (Pa. 1997) (citing **Commonwealth v. Travaglia**, 661 A.2d 352, 356 n.4 (Pa. 1995)). Where, as here, a petitioner claims that he received ineffective assistance of counsel, our Supreme Court has directed that the following standards apply:

[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 "[i]neffective 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." [**Commonwealth v. Colavita**, 606 Pa. [1,] 21, 993 A.2d [874,] 886 [(Pa. 2010)] (citing **Strickland v. Washington**, 104 S.Ct.

2053 (1984)]). In Pennsylvania, we have refined the **Strickland** performance and prejudice test into a three-part inquiry. **See [Commonwealth v.] Pierce**, [515 Pa. 153, 527 A.2d 973 (Pa. 1987)]. Thus, to prove counsel ineffective, the petitioner must show that: (1) his underlying claim is of arguable merit; (2) counsel had no reasonable basis for his action or inaction; and (3) the petitioner suffered actual prejudice as a result. **Commonwealth v. Ali**, 608 Pa. 71, 86, 10 A.3d 282, 291 (2010). "If a petitioner fails to prove any of these prongs, his claim fails." **Commonwealth v. Simpson**, [620] Pa. [60, 73], 66 A.3d 253, 260 (2013) (citation omitted). Generally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. **See Ali, supra**. Where matters of strategy and tactics are concerned, "[a] finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued." **Colavita**, 606 Pa. at 21, 993 A.2d at 887 (quotation and quotation marks omitted). To demonstrate prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." **Commonwealth v. King**, 618 Pa. 405, 57 A.3d 607, 613 (2012) (quotation, quotation marks, and citation omitted). "[A] reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding." **Ali**, 608 Pa. at 86-87, 10 A.3d at 291 (quoting **Commonwealth v. Collins**, 598 Pa. 397, 957 A.2d 237, 244 (2008) (citing **Strickland**, 466 U.S. at 694, 104 S.Ct. 2052)).

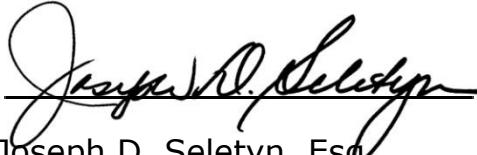
**Commonwealth v. Spatz**, 84 A.3d 294, 311-12 (Pa. 2014).

In assessing the merits of Appellant's above-stated ineffectiveness claims, we have examined the certified record, the briefs of the parties, and the applicable law. Additionally, we have reviewed the thorough and well-crafted opinion of the Honorable Gary S. Silow of the Court of Common Pleas of Montgomery County. We conclude that Judge Silow's extensive, well-reasoned opinion accurately disposes of the issues presented by Appellant, and we discern no error in Judge Silow's decision to reject Appellant's

ineffectiveness claims.<sup>1</sup> **See** PCO at 2-11. Accordingly, we adopt Judge Silow's opinion as our own and affirm the order denying Appellant's PCRA petition on the grounds set forth therein.

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: 5/29/18

---

<sup>1</sup> This is especially true where Appellant fails to present any meaningful discussion of the prejudice he suffered from counsel's alleged ineffectiveness. For instance, in Appellant's first issue, his entire prejudice argument consists of the following:

Finally, it is clear that Appellant suffered prejudice, as a result of Attorney [Vincent A.] Cirillo's error, in failing to call any [c]haracter [w]itnesses on Appellant's behalf[,], as there was at least a reasonable probability of a different outcome at trial, had the jury been instructed on the weight and effect to be given character evidence, pursuant to Pa. SSJI (Crim)3.06.

Appellant's Brief at 21. Appellant reiterates similar, boilerplate prejudice arguments for each of his other three issues. **See id.** at 24, 27, 32-33.

517012-18-

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,  
PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF  
PENNSYLVANIA

NO. 8965-11

v.

MICHAEL DAVID RUTH

O P I N I O N

SILOW, J.

MARCH 29, 2017

Michael David Ruth ("defendant") appeals from the Order that denied after a hearing his petition under the Post Conviction Relief Act ("PCRA"). For the reasons set forth below, the Order should be affirmed.

**I. FACTUAL AND PROCEDURAL HISTORY**

Over a nearly two-year period beginning in early 2010, defendant's father, Richard Ruth, a then-practicing osteopathic physician, unlawfully prescribed tens of thousands of pills from his office in Souderton, Montgomery County, acting as a source of Oxycodone, Adderall and other controlled substances for drug-addicted patients. Defendant served as his father's office manager during this period.

Defendant and his father were co-defendants at a joint trial. Defendant was represented by Vincent A. Cirillo, IV; his father was represented by Gregory R. Noonan and John L. Walfish, Esquire. A jury found defendant guilty on November 22, 2013, of corrupt organizations, dealing in unlawful proceeds, insurance fraud, identity theft and conspiracy to commit insurance fraud and identity theft.

Prior to sentencing, one of Richard Ruth's attorneys, Noonan, was charged in Montgomery County with possession of a controlled substance with intent to deliver and related offenses. Defendant and his father appeared at sentencing with new counsel. This court sentenced defendant to 2 to 5 years in prison on the corrupt organizations offense, 2 to 5 five years in prison for dealing in unlawful proceeds, 6 to 12 months in prison for conspiracy to commit insurance fraud, 1 to 5 years in prison for conspiracy to commit identity theft, 1 to 5 years in prison for identity theft and 6 to 12 months in prison for insurance fraud. The sentences, which were set to run consecutively, aggregated to 7 to 22 years in prison.

Defendant filed a post-sentence motion, which this court denied. He appealed and the Pennsylvania Superior Court affirmed his judgment of sentence. *Commonwealth v. Ruth*, No. 2627 EDA 2014, memorandum (Pa. Super. Sept. 23, 2015). Defendant did not file a petition for allowance of appeal, making his judgment of sentence final on or about October 23, 2015.

Defendant, through counsel, filed a PCRA petition on September 9, 2016. This court denied the petition after a hearing and defendant appealed to the Superior Court. He subsequently produced a concise statement of errors in accordance with Pennsylvania Rule of Appellate Procedure 1925(b).

## II. ISSUES

Defendant raised the following issues in his concise statement:

1. Did the Trial Court err in denying [defendant's] Petition for Post-Conviction Relief, where it found that Trial Counsel was not ineffective for failing to call any Character Witnesses to testify as

[to defendant's] reputation for truthfulness and honesty and/or his reputation as a peaceful and law abiding person?

2. Did the Trial Court err in denying [defendant's] Petition for Post-Conviction Relief, where it found that Trial Counsel was not ineffective for calling a Defense Witness who had previously suffered a conviction for a *crimen falsi* offense; along with a conviction for the offense of Possession With the Intent to Deliver a Controlled Substance, a crime substantially similar to that which [defendant] was being tried?
3. Did the Trial Court err in denying [defendant's] Petition for Post-Conviction Relief, where it found that Trial Counsel was not ineffective for calling a Defense Expert Witness, who was wholly unfamiliar with the facts and circumstances of [defendant's] case, to refute the Commonwealth's Expert Witness?
4. Did the Trial Court err in denying [defendant's] Petition for Post-Conviction Relief, where it found that Trial Counsel was not ineffective for allowing Lead Trial Counsel, Gregory R. Noonan, Esquire, to make the trial strategy decisions for [defendant], at a time that he was abusing controlled substances?

### III. PCRA STANDARD

A defendant seeking PCRA relief on the basis of alleged counsel ineffectiveness:

must plead and prove the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. Counsel's actions will not be found to have lacked a reasonable basis unless the petitioner establishes that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different. The law presumes counsel was effective.

*Commonwealth v. Miner*, 44 A.3d 684, 687 (Pa. Super. 2012) (citing

*Commonwealth v. Cox*, 983 A.2d 666, 678 (Pa. 2009).

IV. DISCUSSION

1. Defendant failed to demonstrate an entitlement to relief on his character evidence claim.

Defendant contends this court erred when it denied his claim related to Cirillo's failure to call character witnesses on his behalf. This claim fails.

Where a PCRA claim is grounded in alleged trial counsel ineffectiveness for failing to call character witnesses, the defendant must demonstrate: "(1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial." *Miner*, 44 A.3d at 687 (citing *Commonwealth v. Clark*, 961 A.2d 80, 90 (2008)).

Instantly, defendant identified no potential character witnesses in his PCRA petition and presented no such witnesses at the PCRA hearing. He failed, therefore, to carry his burden of showing that character witnesses existed, that they were available and willing to testify at trial and that Cirillo knew or should have known about them.

In addition, while this court is aware that character evidence alone may be sufficient to justify an acquittal, the overwhelming evidence presented by the Commonwealth demonstrated beyond a reasonable doubt that defendant engaged in a drug distribution scheme that preyed upon his father's patients. He, therefore, cannot show prejudice from the alleged failure of Cirillo to call character witnesses.



2. Defendant is not entitled to relief on the claim based on trial counsel calling a witness with a criminal record.

Defendant next makes the curious claim that this court erred by finding Cirillo did not render ineffective assistance by calling Brian Ehret as a witness even though he had prior theft and possession with intent to deliver convictions. This claim is meritless and also highlights defendant's unconvincing attempt to create the impression that Noonan, one of his father's two attorneys, also provided representation to him.

Cirillo did not call Ehret as a witness at trial; counsel for his father did. Defendant presented no credible evidence at the PCRA hearing that counsel for his father called Ehret as a witness on defendant's behalf or that Cirillo had the ability, but failed somehow, to constrain the actions of two other attorneys representing a different client. As such, defendant's claim fails. See *Commonwealth v. Iacino*, 401 A.2d 1355, 1361 (Pa. Super. 1979), *aff'd*, 415 A.2d 61 (1980) (defendant had no standing to argue the ineffective assistance of co-defendant's counsel).

Defendant, nevertheless, takes the position that Noonan acted as "lead trial counsel" for both defendants. To do so, he ignores that he had separate counsel whom he retained because Noonan, who already had been hired to represent defendant's father, indicated that defendant needed to have separate counsel. (N.T., 1/19/17, p. 51) This court previously determined in connection with defendant's direct appeal that the trial record demonstrated defendant was not represented by his father's co-counsel, but that Cirillo was his sole attorney:

Defendant had his own counsel throughout the pre-trial and trial stages of this case, and the record is replete with references by defense counsel to which defendant they represented. See, e.g., N.T. 11/19/13, p. 38 (“Good morning, ladies and gentlemen. My name is Vincent Cirillo, and I represent Michael Ruth, Dr. Richard Ruth’s son.”); *Id.* at 84 (“My name is Gregory Noonan, and I represent Dr. Richard Ruth.”); N.T. 11/21/13, p. 45 (“My name is Gregory Noonan. I, along with John Walfish, represent Dr. Richard Ruth.”); *Id.* at 57 (“Lieutenant, my name is Vince Cirillo, and I represent Michael Ruth.”); N.T. 11/22/13, p. 154 (“Ladies and Gentlemen of the Jury, as you know, I along with my partner John Walfish, we represent Dr. Richard Ruth.”).

Noonan never entered his appearance on behalf of defendant. Attorney Cirillo made an opening statement on behalf of defendant, examined witnesses independently of counsel for Richard Ruth and gave a closing argument on behalf of his client. As such, defendant does not have standing to raise a claim related to his co-defendant’s attorney.<sup>9</sup>

<sup>9</sup> Defendant cites *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990), for the proposition that the ineffective assistance of lead counsel is not cured by the presence of co-counsel. His reliance on this case is misplaced. The record here does not support the proposition that Noonan was lead counsel for both defendants. Moreover, in *Hoffman*, the attorney represented two defendants in a joint murder trial and used co-counsel to assist him with examining certain witnesses. That is not the case here.

*Opinion*, Silow, J., Nov. 12, 2014. The Superior Court agreed with that analysis. *Commonwealth v. Ruth*, No. 2627 EDA 2014, memorandum, p. 5.

The evidence presented at the PCRA hearing did nothing to change this court’s prior determination that Cirillo was responsible for defendant’s representation. This court found defendant did not testify credibly on this

issue at the hearing, given his interest in the outcome of the hearing. As for Cirillo, this court found his self-serving testimony, which attempted to shift the focus from himself onto Noonan, to be incredible. Instead, the record demonstrates that Cirillo served as counsel for defendant.<sup>1</sup>

Even were defendant able to proceed on a theory that attorneys who did not represent him provided him with ineffective assistance, he did not demonstrate a lack of a reasonable basis for his father's attorneys presenting Ehret as a witness. Noonan testified credibly at the PCRA hearing that:

You know, we did everything calculated - - I mean, there was a reason why we did everything. We had issues just in - - for example, in getting a witness. We had one of the witnesses that you objected to because they had a record. Well, we - - there was a reason why we had that person testify. We needed to have somebody testify. And there were issues, there were problems. You know, there weren't took many friendly faces in the patient community that we could have testify.... We went with who we could.

*Id.* at 56. As such, not only did defendant fail to demonstrate that Cirillo provided ineffective assistance with regard to Ehret being called as a witness, he also did not prove the absence of a reasonable basis for his father's attorneys calling him.

The record, furthermore, demonstrates a lack of prejudice. The Commonwealth presented overwhelming evidence of defendant's guilt. He

---

<sup>1</sup> See, e.g., N.T., 1/19/17, p. 66 (when asked if he knew whether the expert witness he had obtained had spoken to defendant, Noonan responded credibly "I couldn't tell you. I don't represent Michael.").

cannot plausibly argue that the outcome of his trial would have been different had Ehret not testified.

3. Defendant is not entitled to relief on his expert witness claim.

Defendant also asserts that this court erred in finding Cirillo did not render ineffective assistance by calling an expert witness who allegedly was not familiar with the facts and circumstances of defendant's case. This issue is meritless.

At trial, counsel for defendant's father presented Bruce Whitman, D.O., on behalf of Richard Ruth as an expert in the fields of osteopathic medicine and emergency room medicine. (N.T., 11/22/13, p. 8) The expert testified on direct examination about the practice of osteopathic medicine, osteopathic manipulative treatment and pain management. *Id.* at 9-18. On cross-examination, Dr. Whitman acknowledged that the report he prepared did not indicate that he had reviewed defendant's patient files. *Id.* at 19. The expert stated, however, that his testimony was based on his training and experience in working with different specialties and how they practice. *Id.*

Defendant assails Cirillo for calling an expert witness who was unfamiliar with the specific facts and circumstances of defendant's case. Again, Cirillo did not call Dr. Whitman as a witness at trial and defendant presented no credible evidence at the PCRA hearing to demonstrate that Cirillo was involved in the decision to call the expert witness or that he had the ability, but failed, to direct the actions of attorneys representing another client. Rather, the record establishes that the attorneys representing the only medical doctor in the case

made the decision to call the expert on behalf of their client. Defendant, thus, has not presented a meritorious claim.

Even had defendant demonstrated that he could assert an ineffectiveness claim against his father's attorneys, Noonan testified credibly about the strategic reasons for presenting Dr. Whitman as an expert witness. (N.T., 1/19/17, pp. 69-71) Noonan further acknowledged that had the defense expert been asked to review the specific facts of the case, he would have been exposed to cross-examination about the volume of pills defendant's father had prescribed. *Id.* at 70-71. Defendant, therefore, failed to demonstrate the lack of a reasonable basis on the part of his father's attorneys for calling Dr. Whitman. In addition, defendant did not demonstrate at the PCRA hearing how having an expert familiar with the specifics of his father's unlawful practice would have affected the outcome of his case.

**4. Defendant is not entitled to relief on his claim that Noonan was abusing controlled substances while allegedly making trial strategy decisions for him.**

Defendant contends this court erred in failing to find Noonan ineffective for allowing Noonan to make trial strategy decision while allegedly abusing controlled substances. This claim, raised for the first time at the PCRA hearing, warrants no relief.

As an initial matter, defendant's allegation that Noonan was abusing controlled substances while making trial strategy decisions is found nowhere in the PCRA petition. The only claim asserted in the PCRA petition with regard to Noonan's involvement with controlled substances is:

[F]ailing to act as a zealous advocate at Trial, due to the inherent conflict of interest that arose between Petitioner/Defendant and Trial Counsel, as a result of Lead Trial Counsel's (Gregory R. Noonan, Esquire) commission of the offense of Possession With the Intent to Deliver a Controlled Substance, while he was representing Petitioner/Defendant at trial for a substantially similar offense.

"Petition for Relief Pursuant to the Pennsylvania Post Conviction Relief Act, 42 Pa. C.S.A. § 9541, et seq.," ¶ 14(e) (Sept. 9, 2016).<sup>2</sup> Defendant neither requested nor received permission to amend his PCRA petition to include a claim, raised for the first time at the hearing, that Noonan was abusing controlled substances while making trial strategy decisions. See *Commonwealth v. Porter*, 35 A.3d 4, 12 (Pa. 2012) (stating that amendment of a PCRA petition is permitted only by direction or leave of the court). As such, this claim is waived for failure to seek and obtain permission to add it to the PCRA petition prior to the hearing.

Even had defendant properly asserted this claim, defendant did not provide credible supporting proof. Other than Cirillo's self-serving testimony, which this court did not credit, defendant presented no evidence of any trial strategy decisions made for him by Noonan. Rather, the trial record and the credible evidence from the PCRA hearing show that Cirillo represented defendant before and during trial.

In addition, Noonan testified unequivocally and credibly at the PCRA hearing that he was not abusing controlled substances at the time of trial.

---

<sup>2</sup> Defendant did not present any evidence at the hearing to support the conflict of interest claim he did assert in the PCRA petition.

11-11-17 10:00 AM

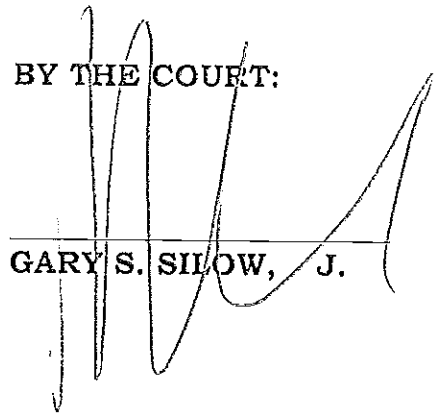
(N.T., 1/19/17, p. 69) Walfish testified credibly that, while the length and stress of the trial may have had an effect on Noonan, he had no reason to believe Noonan was abusing controlled substances at the time of trial. *Id.* at 88-89. Even defendant, who has the greatest stake in the outcome of the PCRA petition, could not testify with any particularity in support of this claim. *Id.* at 27. As such, the claim that Cirillo was ineffective for allowing Noonan to make trial strategy decisions while allegedly abusing controlled substances, raised improperly for the first time at the PCRA hearing, fails for lack of supporting by credible evidence.<sup>3</sup>

**IV. CONCLUSION**

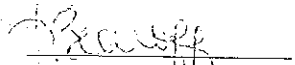
Based upon the foregoing, the Order denying defendant's PCRA petition should be affirmed.

**BY THE COURT:**

**GARY S. SILOW, J.**



Sent on 3/30/17  
to the following:  
Clerk of Courts (original)  
DDA Robert Falin  
Francis Genovese, Esquire

  
Judicial Secretary

<sup>3</sup> Even had defendant presented credible evidence on this issue, which he did not, the claim would still fail for lack of prejudice. The Commonwealth presented overwhelming evidence of his guilt.