

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
JAMES HOLLAND HAYWARD,	:	No. 60 EDA 2018
	:	
Appellant	:	

Appeal from the PCRA Order, November 30, 2017,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0003233-2010

BEFORE: GANTMAN, P.J., McLAUGHLIN, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED NOVEMBER 20, 2018**

James Holland Hayward appeals from the November 30, 2017 order entered by the Court of Common Pleas of Philadelphia County denying his petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541-9546. After careful review, we affirm.

The PCRA court provided the following procedural history:

On July 15, 2011, following a jury trial before the Honorable Carolyn Engel Temin, the jury convicted [a]ppellant of first-degree murder, possession of an instrument of crime (“PIC”), and [v]iolation of the Uniform Firearms Act (“VUFA”). On November 18, 2011, the trial court sentenced [a]ppellant to life in prison without the possibility of parole for his first-degree murder conviction, and consecutive terms of three to six and one to two years of incarceration for his VUFA and PIC convictions, respect[ively]. Appellant filed a timely direct appeal to the Pennsylvania Superior Court. The Superior Court affirmed the lower court’s judgments of

sentence on December 19, 2012. On November 25, 2013, [a]ppellant filed a **pro se** PCRA petition. On April 29, 2016, [a]ppellant, through counsel, filed an Amended PCRA petition. On July 27, 2017, the Commonwealth filed a motion to dismiss [a]ppellant's PCRA petition. On September 18, 2017, [the PCRA court] submitted an intent to dismiss notice under Rule 907. On November 30, 2017, [the PCRA court] formally dismissed [a]ppellant's PCRA petition for lack of merit. On December 19, 2017, [a]ppellant filed a timely notice of appeal. On January 27, 2018 [a]ppellant filed a Statement of Errors Complained of on Appeal pursuant to [the PCRA court's] order.

PCRA court opinion, 4/19/18 at 1-2. On April 19, 2018, the PCRA court filed an opinion pursuant to Pa.R.A.P. 1925(a).

Appellant raises the following issue for our review:

Did the Honorable PCRA Court err when it dismissed [appellant's] [p]etition, without a [h]earing, and all [sic] where [appellant] properly pled and would have been able to prove that he was entitled to PCRA relief in the form of a new trial?

Appellant's brief at 3.

Preliminarily, we note that appellant argues that the PCRA court erred when it dismissed his PCRA petition without a hearing, thus denying appellant the opportunity to meet his evidentiary burden under the PCRA. (**See** appellant's brief at 8.) Our cases have consistently held, however, that a PCRA 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 [appellant] is not entitled to post-conviction relief, and no purpose would be served by any further

proceedings.” **Commonwealth v. Johnson**, 945 A.2d 185, 188 (Pa.Super. 2008), **appeal denied**, 965 A.2d 433 (Pa. 2008), quoting **Commonwealth v. Taylor**, 933 A.2d 1035, 1040 (Pa.Super. 2007), **appeal denied**, 951 A.2d 1163 (Pa. 2008) (citations omitted).

We will now turn to the merits of appellant’s appeal. In his sole issue before us for review, appellant avers that the trial court erred by not holding an evidentiary hearing, as appellant contends that he would have been able to meet his evidentiary burden had a hearing been held. (Appellant’s brief at 9.) Appellant’s underlying claim for post-conviction relief is based in ineffective assistance of counsel. (**Id.**) In furtherance of his claim, appellant identifies several witnesses that “were available and should have been called by the defense at trial.” (**Id.**)

PCRA petitions are subject to the following standard of review:

“[A]s a general proposition, we review a denial of PCRA relief to determine whether the findings of the PCRA court are supported by the record and free of legal error.” **Commonwealth v. Dennis**, [] 17 A.3d 297, 301 ([Pa.] 2011) (citation omitted). A PCRA court’s credibility findings are to be accorded great deference, and where supported by the record, such determinations are binding on a reviewing court. **Id.**, at 305 (citations omitted). To obtain PCRA relief, appellant must plead and prove by a preponderance of the evidence: (1) his conviction or sentence resulted from one or more of the errors enumerated in 42 Pa.C.S. § 9543(a)(2); (2) his claims have not been previously litigated or waived, **id.**, § 9543(a)(3); and (3) “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)(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). “[A]n 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 postconviction proceeding.” *Id.*, § 9544(b).

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***, [] 30 A.3d 1111, 1127 ([Pa.] 2011) (employing ineffective assistance of counsel test from ***Commonwealth v. Pierce***, [] 527 A.2d 973, 975-76 ([Pa.] 1987)).[Footnote 5] Counsel is presumed to have rendered effective assistance. ***Commonwealth v. Ali***, [] 10 A.3d 282, 291 ([Pa.] 2010). Additionally, counsel cannot be deemed ineffective for failing to raise a meritless claim. ***Commonwealth v. Jones***, [] 912 A.2d 268, 278 ([Pa.] 2006). 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. ***Ali***, [10 A.3d] at 291.

[Footnote 5] ***Pierce*** reiterates the preexisting three-prong test for ineffective assistance of counsel in Pennsylvania and holds it to be consistent with the two-prong performance and prejudice test in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Pierce***, 527 A.2d at 976-977.

Commonwealth v. Treiber, 121 A.3d 435, 444-445 (Pa. 2015).

When evaluating whether counsel was ineffective for failing to call a potential witness, we are bound by the following standard:

When raising a failure to call a potential witness claim, the PCRA petitioner satisfies the performance and prejudice requirements of the ***Strickland*** test by establishing that:

- (1) the witness existed;
- (2) the witness was available to testify for the defense;
- (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 of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Washington, [] 927 A.2d 586, 599 ([Pa.] 2007). To demonstrate ***Strickland*** prejudice, the PCRA petitioner “must show how the uncalled witnesses’ testimony would have been beneficial under the circumstances of the case.” ***Commonwealth v. Gibson***, [] 951 A.2d 1110, 1134 ([Pa.] 2008); ***see also Commonwealth v. Chmiel***, [] 889 A.2d 501, 546 ([Pa.] 2005) (“Trial counsel’s failure to call a particular witness does not constitute ineffective assistance without some showing that the absent witness’ testimony would have been beneficial or helpful in establishing the asserted defense.”).

Commonwealth v. Johnson, 966 A.2d 523, 536 (Pa. 2009).

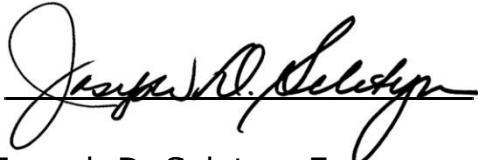
Here, appellant specifically names Randy Acosta, Lily Castaceda, and Maliea Jamerson as witnesses who would have testified on his behalf. Appellant, however, has failed to file any certifications to the effect that these witnesses were available to testify and would have testified as

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asserted. Moreover, throughout his amended PCRA petition and his brief, appellant fails to include **any** discussion as to whether any of these witnesses were willing to testify on his behalf. Accordingly, appellant failed to meet his evidentiary burden under the **Pierce** test. Therefore, appellant's sole issue on appeal is without merit.

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: 11/20/18