

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
AMAR GREEN	:	
	:	
Appellant	:	No. 681 EDA 2018

Appeal from the PCRA Order March 5, 2018  
in the Court of Common Pleas of Philadelphia County  
Criminal Division at No.: CP-51-CR-1203321-2003

BEFORE: GANTMAN, P.J., OTT, J., and PLATT\*, J.

MEMORANDUM BY PLATT, J.:

**FILED NOVEMBER 20, 2018**

Appellant, Amar Green, appeals from the order of the Court of Common Pleas of Philadelphia County, entered March 5, 2018, that denied his first petition filed under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541–9546, without an evidentiary hearing. We affirm.

The facts of the underlying case are not in substantial dispute. Appellant and a cohort fatally shot the victim, Luther Johnson, Jr., who was riding a bicycle down the street. It appears the murder may have been in retaliation for a prior shooting. Ballistics evidence confirmed that the fatal shots, as well as bullet casings from a prior shooting of the (same) victim, and a subsequent shooting, all came from Appellant’s handgun. An eyewitness saw the incident. When the eyewitness came to court to testify, Appellant threatened to kill him

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\* Retired Senior Judge assigned to the Superior Court.

and all of his family.<sup>1</sup> A jailhouse informant testified that Appellant admitted to the shooting while the two were incarcerated together.

On August 30, 2012, a jury found Appellant guilty of First Degree Murder, 18 Pa.C.S.A. § 2502(a), as a felony of the first degree; Conspiracy to Commit First Degree Murder, 18 Pa.C.S.A. § 903, as a felony of the first degree; Violation of the Uniform Firearms Act (firearms not to be carried in public), 18 Pa.C.S.A. § 6108, as a misdemeanor of the first degree; and possession of an instrument of crime, 18 Pa.C.S.A. § 907, as a misdemeanor of the first degree.<sup>2</sup> On the same day, the court sentenced Appellant to life in prison without the possibility of parole on the first-degree murder charge, and imposed a concurrent sentence of not less than fourteen nor more than thirty years of confinement for the other related crimes charged.

On September 27, 2012, Appellant filed a timely notice of appeal with the Pennsylvania Superior Court. On August 15, 2014, this Court affirmed the judgment of sentence. On February 10, 2015, the Pennsylvania Supreme Court denied allowance of appeal. On July 27, 2015, Appellant filed a timely *pro se* PCRA petition.

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<sup>1</sup> The eyewitness fled the jurisdiction to avoid testifying. He was eventually found, and placed in a witness protection program.

<sup>2</sup> The jury acquitted the co-defendant, Wahikee M. Custis.

On January 8, 2017, PCRA counsel Stephen T. O'Hanlon, Esq. filed an amended petition. On November 13, 2017, the Commonwealth filed a motion to dismiss Appellant's petition. On January 22, 2018, the Commonwealth filed an amended motion to dismiss. On January 30, 2018, the PCRA court sent a notice pursuant to Pennsylvania Rule of Criminal Procedure 907 of Intent to Dismiss. Appellant did not respond.

On March 5, 2018, the PCRA Court formally dismissed Appellant's petition. The same day, PCRA Attorney O'Hanlon filed a timely notice of appeal to this Court. On April 2, 2018, counsel filed a Rule 1925(b) statement of errors complained of on appeal, pursuant to an order of the court.

Appellant raises two questions on appeal:

1. Did the PCRA court err in dismissing Appellant's PCRA [p]etition without a hearing because trial counsel was ineffective for not investigating and presenting character witnesses as to Appellant's reputation in his community for the character trait of being non-violent and Appellant was prejudiced as a result?

2. Did the PCRA court err in dismissing Appellant's PCRA [p]etition without a hearing because prior counsel were ineffective for not requesting a mistrial and for not raising the prosecutor's negative inference regarding Appellant's Fifth Amendment privilege on direct appeal?

(Appellant's Brief, at 4).

"[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."

***Commonwealth v. Colavita***, 993 A.2d 874, 886 (Pa. 2010). 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. **See Commonwealth v. Sam**, 952 A.2d 565, 573 (Pa. 2008), *cert. denied*, 558 U.S. 828 (2009). For purely legal questions, our scope of review is plenary and our standard of review is *de novo*. **See Commonwealth v. Mallory**, 941 A.2d 686, 694 (Pa. 2008), *cert. denied*, 555 U.S. 884 (2008).

The issues presented in this appeal implicate ineffective assistance of trial counsel. 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.A. § 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.” **See Colavita, supra** at 886 (citing **Strickland v. Washington**, 466 U.S. 668 (1984)); **see also Commonwealth v. Pierce**, 527 A.2d 973 (Pa. 1987).

In Pennsylvania, we have refined the **Strickland** performance and prejudice test into a three-part inquiry. **See Pierce, supra** at 975. 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. **See Commonwealth v. Ali**, 10 A.3d 282, 291 (Pa. 2010).

“If a petitioner fails to prove any of these prongs, his claim fails.” **Commonwealth v. Simpson**, 66 A.3d 253, 260 (Pa. 2013) (citation omitted).

Generally, counsel’s assistance is deemed constitutionally effective if he or she chose a particular course of conduct that had some reasonable basis designed to effectuate his or her client’s interests. **See Ali, supra** at 291. 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, supra** at 887 (citation 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**, 57 A.3d 607, 613 (Pa. 2012) (citations omitted). “[A] reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.” **Commonwealth v. Collins**, 957 A.2d 237, 244 (Pa. 2008) (citing **Strickland, supra** at 694).

To prevail on a claim of trial counsel’s ineffectiveness for failure to call a witness, the [appellant] must show: (1) that the witness existed; (2) that the witness was available; (3) that counsel was informed of the existence of the

witness or should have known of the witness's existence; (4) that the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) that the absence of the testimony prejudiced appellant. (citation omitted).

Thus, trial counsel will not be found ineffective for failing to investigate or call a witness unless there is some showing by the appellant that the witness's testimony would have been helpful to the defense. **Commonwealth v. Auker**, 545 Pa. 521, 548, 681 A.2d 1305, 1319 (1996). "A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy." **Id.**

**Commonwealth v. Brown**, 767 A.2d 576, 581-82 (Pa. Super. 2001) (one citation omitted).

Here, in his first issue, Appellant claims ineffectiveness of trial counsel for not presenting character witnesses. (**See** Appellant's Brief, at 8-12). Appellant's claim does not merit relief. The PCRA court persuasively explained that counsel had a reasonable basis for not presenting character witnesses, which would have led to cross-examination and impeachment, particularly about Appellant's conviction for *crimen falsi*, drug convictions, as well as Appellant's attempted intimidation of a witness, and his involvement in the prior and subsequent shootings. (**See** N.T. PCRA Hearing, 1/30/18, at 3-7). We discern no ground to disturb the PCRA court's conclusion that counsel had a reasonable strategic basis for the decision not to present character witnesses. Appellant's first claim fails.

Appellant's second issue assigns error to trial counsel's decision not to move for a mistrial after Michael Medway, counsel for co-defendant, Wahikee

M. Custis, improperly and disingenuously suggested that his client's "Not guilty" plea could be accepted by the jury as exculpatory testimony. (**See** Appellant's Brief, at 12-19; **see also** N.T. Trial, 8/28/12, at 153; 241-42).

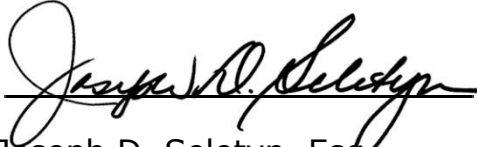
In final argument, the assistant district attorney attempted to explain that Custis' "Not guilty" plea was not subject to cross-examination and did not constitute testimony. Defense counsel objected and the trial court sustained the objection, twice. (**See** N.T. Trial, 8/28/12, at 241-42).

On appeal, counsel attempts to transform the prosecutor's explanation (that Custis' "not guilty" plea was not testimony), into an impermissible comment on Appellant's constitutional right to remain silent. Plainly, it was not. (**See id.**). It was a fair response to the other defense counsel's ploy. In any event, the other co-defendant (to whom the remarks were actually directed) was acquitted. There is no evidence of prejudice. Appellant's second issue does not merit relief. 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**, 57 A.3d 607, 613 (Pa. 2012) (citation omitted). Here, Appellant offers no evidence to establish that but for counsel's choices the outcome would have been different.

Order affirmed.

J-S53010-18

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/20/18