NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
HENRY G. HEREDIA,	:	No. 220 MDA 2012
Appellant	:	

Appeal from the Order Entered December 29, 2011,
in the Court of Common Pleas of Union County
Criminal Division at No. CP-60-CR-0000354-2007

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 12, 2013

Henry G. Heredia appeals from the order of December 29, 2011, disposing of his first petition for post-conviction collateral relief pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm in part, vacate in part, and remand for further proceedings.

On direct appeal, this court summarized the history of this case as follows:

> On August 15, 2007, several drivers reported Appellant's white Jeep Cherokee driving recklessly on Interstate 80 in Union County, Pennsylvania. Upon arriving at the scene, Pennsylvania State Police Trooper Matthew J. LaForme and Corporal Richard Henry observed two commercial tractor trailers attempting to block Appellant and initiated a traffic stop. However, Appellant fled the scene and was pursued by the troopers at a high rate of speed through traffic. After catching up with Appellant, Trooper LaForme and Corporal Henry positioned their

> patrol cars to the front and rear of Appellant's vehicle in an attempt to conduct a rolling roadblock. During this period, Appellant's vehicle made contact with the troopers' vehicles on several occasions. The troopers were eventually able to stop Appellant, and he was placed in custody. Both troopers testified that Appellant appeared to be intoxicated at the time of his arrest and had "blurred and … glassy" eyes and smelled strongly of alcohol. N.T. Jury Trial, 3/11/08, at 63, 147. Additionally, Appellant yelled vulgar language and obscenities at the troopers during his arrest and subsequent transportation to Evangelical Community Hospital for a blood analysis. At the hospital, Appellant consented to have his blood drawn. ***Id.*** at 69-70.
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> Thereafter, on March 11, 2008, Appellant proceeded to a jury trial and was subsequently found guilty of aggravated assault, fleeing or attempting to elude police, two counts each of recklessly endangering another person, DUI, and disorderly conduct, and various summary traffic violations. On May 13, 2008, Appellant was sentenced to 58 to 126 months' imprisonment. Appellant filed timely post-sentence motions which were denied by the trial court on August 15, 2008.

Commonwealth v. Heredia, 986 A.2d 1256 at 1-3 (Pa.Super. filed September 8, 2009) (unpublished memorandum). A timely appeal followed, and this court affirmed the judgment of sentence on September 8, 2009. ***Id.*** Appellant did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On February 24, 2010, appellant filed a timely counseled PCRA petition. New counsel was appointed, and filed an amended petition on appellant's behalf. An evidentiary hearing was held on May 11, 2011, at which appellant and trial counsel, Brian Ulmer, Esq., testified. On

December 29, 2011, the PCRA court entered an opinion and order disposing of appellant's petition. As more fully explained below, the PCRA court granted appellant's request for post-conviction relief in part, and denied it in part. This timely appeal followed on January 24, 2012. Appellant complied with the PCRA court's order to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. In response thereto, the PCRA court relies on its December 29, 2011 opinion, as well as the transcript of the evidentiary hearing.

Appellant raises the following issues for this court's review:

> I. Did the Trial Court err when it allowed the Commonwealth to introduce the forensic laboratory's report without the forensic analyst present to testify at trial in violation of [appellant]'s Right to Confrontation under the Pennsylvania and United States Constitutions?
>
> II. Did the Trial Court err when it denied [appellant]'s Allegation of Ineffective Assistance of Counsel as it relates to Trial Counsel's failure to properly advise [appellant] as to Trial Counsel's opinion as to whether or not to accept a plea agreement offered immediately prior to trial?
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> III. Did the Trial Court err when it denied [appellant]'s Allegation of Ineffective Assistance of Counsel as it related to Trial Counsel's failure to cross-examine Commonwealth witnesses at specific times throughout the trial when Trial Counsel's explanation as to why he did not was that he saved these points for closing arguments and transcripts from said closing arguments clearly show that these points were not addressed?

> IV. Did the Trial Court err when it Denied [appellant]'s Allegation of Ineffective Assistance of Counsel as it relates to Trial Counsel's Failure to Interview any potential defense or prosecutorial witnesses?

Appellant's brief at 2.

Initially, we recite our standard of review:

> This Court's standard of review regarding an order denying a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Halley***, 582 Pa. 164, 870 A.2d 795, 799 n. 2 (2005). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa.Super.2001).

Commonwealth v. Turetsky, 925 A.2d 876, 879 (Pa.Super. 2007), ***appeal denied***, 596 Pa. 707, 940 A.2d 365 (2007).

> "To prevail on a claim alleging counsel's ineffectiveness, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness." ***Commonwealth v. Wallace***, 555 Pa. 397, 407, 724 A.2d 916, 921 (1999), citing ***Commonwealth v. Howard***, 538 Pa. 86, 93, 645 A.2d 1300, 1304 (1994) (other citation omitted). In order to meet the prejudice prong of the ineffectiveness standard, a defendant must show that there is a "'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Commonwealth v. Kimball***, 555 Pa. 299, 308, 724 A.2d 326, 331 (1999), quoting ***Strickland v. Washington***, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A "'[r]easonable probability' is defined as 'a probability sufficient to undermine

> confidence in the outcome.'" ***Id.*** at 309, 724 A.2d at 331, quoting ***Strickland***, 466 U.S. at 694, 104 S.Ct. 2052.

Commonwealth v. Jones, 811 A.2d 1057, 1060 (Pa.Super. 2002), ***appeal denied***, 574 Pa. 765, 832 A.2d 435 (2003). "We presume counsel is effective and place upon Appellant the burden of proving otherwise. Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004) (citations omitted).

In his first issue on appeal, appellant argues that trial counsel was ineffective for failing to object to the introduction into evidence of the forensic laboratory report. The lab report indicated that appellant had a blood alcohol content ("BAC") of 0.239. (Notes of testimony, 3/11/08 at 104.) The Commonwealth did not call as witnesses the nurse who drew appellant's blood, or the analyst who prepared the report. It is appellant's contention that admission of the report violated his right of confrontation under the Sixth Amendment. Attorney Ulmer did object to the report on other grounds, but not on the basis that it violated appellant's confrontation rights.

Appellant raised this issue on direct appeal and this court found it to be waived. We observed that trial counsel made a number of objections regarding the BAC results but failed to properly preserve the Confrontation Clause claim by objecting on that specific basis. ***Heredia***, ***supra*** at 4.

The PCRA court determined that the issue has arguable merit based on the United States Supreme Court's decision in ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S.Ct. 2527 (2009), and this court's decision in ***Commonwealth v. Barton-Martin***, 5 A.3d 363 (Pa.Super. 2010), ***appeal denied***, 612 Pa. 695, 30 A.3d 486 (2011). (PCRA court opinion, 12/29/11 at 8.) The PCRA court also found that Attorney Ulmer's failure to properly preserve the issue for direct appeal was without any reasonable basis designed to effectuate his client's interests. (***Id.*** at 8-9.) According to the PCRA court, based on the case law cited above, it is possible that the outcome of the direct appeal would have been favorable to appellant and resulted in a new trial. (***Id.***) However, the PCRA court did not actually grant appellant a new trial; instead, the PCRA court opines that appellant should be permitted to bring the issue before this court, and we should decide it on the merits. (***Id.*** at 9.) The PCRA court purports to reinstate appellant's right to appeal the Confrontation Clause issue. (***Id.***) The Commonwealth concedes in its brief on appeal that trial counsel was ineffective for failing to preserve the Confrontation Clause issue and that appellant is entitled to a new trial on the DUI charges. (Commonwealth's brief at 4-5.)

In ***Crawford v. Washington***, 541 U.S. 36 (2004), the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits the use of testimonial hearsay obtained by police officers against a

criminal defendant, even if such hearsay is reliable, unless the defendant has the opportunity to cross-examine the unavailable declarant. In ***Melendez-Diaz***, the defendant objected to the admission of forensic reports which determined certain seized substances to be cocaine. He maintained that he had a constitutional right to confront the analysts who prepared the reports, who should have been required to testify in person. The Supreme Court agreed, holding that the certificates of analysis were affidavits made under circumstances leading a reasonable person to believe they would be used at a later trial. As such, they fell within the "class of testimonial statements covered by the Confrontation Clause" delineated in ***Crawford***. Because Melendez-Diaz was deprived of his right to confront the analysts who prepared the certificates, they were held to be inadmissible. ***Id.*** at ___, 129 S.Ct. at 2532. ***See also Bullcoming v. New Mexico***, ___ U.S. ___, 131 S.Ct. 2705 (2011) (defendant charged with DUI had the right to confront the analyst who completed, signed and certified the BAC forensic lab report; "surrogate testimony" of another analyst from the same lab was insufficient). Notably, the Court's decision in ***Melendez-Diaz*** involved the straightforward application of its holding in ***Crawford***. ***Melendez-Diaz***, ***supra*** at __, 129 S.Ct. at 2533, 2542.

In ***Barton-Martin***, the Commonwealth presented the testimony of the laboratory administrative director and custodian of records at the hospital where the defendant's blood was drawn; however, the Commonwealth did

not call the technologist who analyzed the defendant's blood. ***Barton-Martin***, 5 A.3d at 366. Based on ***Melendez-Diaz***, this court held that the admission of the defendant's BAC test results was error:

> [P]ursuant to the Supreme Court's holding in ***Melendez-Diaz***, absent a showing that the laboratory technician was unavailable, and the Appellant had a prior opportunity to cross-examine her, the laboratory technician's failure to testify in the Commonwealth's case-in-chief violated Appellant's Sixth Amendment right to confrontation.

Id. at 369. ***Cf. Commonwealth v. Yohe***, 39 A.3d 381 (Pa.Super. 2012) (testimony of forensic toxicologist who certified the results of the BAC testing and authored the report sought to be admitted as evidence satisfied the defendant's right to confrontation, though the toxicologist did not personally handle the defendant's blood sample or prepare portions for testing) (distinguishing ***Barton-Martin*** and ***Bullcoming***). In ***Barton-Martin***, we applied the holding in ***Melendez-Diaz*** retroactively where the case was on direct appeal. ***Id.*** at 369, citing ***Briscoe v. Virginia***, ___ U.S. ___, 130 S.Ct. 1316 (2010). ***Cf. Commonwealth v. Leggett***, 16 A.3d 1144, 1147-1148 (Pa.Super. 2011) (U.S. Supreme Court has not specifically held that ***Melendez-Diaz*** applies retroactively to cases on collateral review); ***Commonwealth v. Brandon***, 51 A.3d 231, 236 n.7 (Pa.Super. 2012) ("The U.S. Supreme Court has directed lower courts to apply ***Melendez-Diaz*** to cases pending final review on direct, but not collateral, appeal.") (citations omitted).

As stated above, the PCRA court purports to grant appellant permission to appeal the issue on the merits. However, appellant has already had a direct appeal, nor did he request reinstatement of his direct appeal rights ***nunc pro tunc***. Appellant raised the issue on direct appeal and we found it to be waived. The only avenue for relief now is to re-frame the issue in terms of trial counsel ineffectiveness and request a new trial. ***See Commonwealth v. Grosella***, 902 A.2d 1290, 1293-1294 (Pa.Super. 2006) ("Where a petitioner was not **entirely** denied his right to a direct appeal and only some of the issues the petitioner wished to pursue were waived, the reinstatement of the petitioner's direct appeal rights is not a proper remedy.") (citations omitted) (emphasis in original).

Granted, ***Melendez-Diaz*** and ***Barton-Martin*** were decided after appellant's trial in this case; and, at the time, there was authority in this Commonwealth for the proposition that crime lab reports, including blood alcohol tests, are non-testimonial and fall within the business records exception to the hearsay rule. ***Commonwealth v. Kravontka***, 558 A.2d 865 (Pa.Super. 1989). Ordinarily, of course, counsel cannot be held ineffective for failing to anticipate changes in the law. ***Commonwealth v. Cox***, 603 Pa. 223, 283, 983 A.2d 666, 702 (2009). Nonetheless, we agree with the PCRA court that trial counsel's failure to preserve the ***Crawford*** Confrontation Clause issue for direct appeal was without a reasonable basis and prejudiced appellant. As stated above, the holding in ***Melendez-Diaz***

was essentially dictated by ***Crawford*** and since appellant's direct appeal was still pending when ***Melendez-Diaz*** was decided, had the issue been preserved there is a fair probability that this court would have granted relief on appeal. Furthermore, admission of the BAC test results at trial clearly prejudiced appellant's DUI case. As such, we will grant appellant relief on this issue and remand for a new trial on the DUI charges.

Because we are granting a new trial only as to the DUI charges, it is necessary to address appellant's remaining issues in regards to his other convictions. In his second issue on appeal, appellant claims that trial counsel was ineffective for failing to properly advise him in connection with a last-minute plea offer by the Commonwealth. "[I]t is settled that counsel has a duty to explain the relative advantages and disadvantages of accepting or rejecting a plea offer and that failure to do so may render counsel ineffective . . . ." ***Commonwealth v. Lewis***, 708 A.2d 497, 501 (Pa.Super. 1998), ***appeal denied***, 555 Pa. 741, 725 A.2d 1219 (1998), citing ***Commonwealth v. Boyd***, 547 Pa. 111, 688 A.2d 1172 (1997).

At the PCRA hearing, appellant testified that just before trial was to begin, the district attorney made a last-minute plea offer. (Notes of testimony, 5/11/11 at 13.) According to appellant, he was discussing the offer with the district attorney when Attorney Ulmer interrupted them and ended the conversation. (***Id.*** at 14-15.) Attorney Ulmer told appellant that he did not want to give away trial strategy. (***Id.***) Appellant testified that

Attorney Ulmer did not offer any advice whatsoever regarding the Commonwealth's proposal. (***Id.***)

Appellant's testimony was contradicted by that of Attorney Ulmer, who testified that he did, in fact, discuss the offer with appellant: "But I did tell him that I thought it was a reasonable offer, and I wouldn't have blamed him for taking it. If he wants to say otherwise now, again, he's lying." (***Id.*** at 64.) The PCRA court specifically found Attorney Ulmer to be credible in this regard: "The Court further finds Mr. Ulmer's testimony credible that he recommended that the plea agreement be accepted under the circumstances, which [appellant] rejected." (***Id.*** at 105.) We are bound by the PCRA court's credibility determinations.

Regarding trial strategy, Attorney Ulmer explained: "[Appellant] is right, I did terminate it because he started bringing up things, basically arguing why he shouldn't be charged the way he was and why the offer should be better; but at that point you're starting to infer what our strategy might be. And, quite frankly, the District Attorney probably could have figured it out for himself, but why give him any advantage; and the offer was what it was." (***Id.*** at 62.)

Appellant takes Attorney Ulmer's remark that "I never do that with somebody, never done it, never will," out of context. (Appellant's brief at 12; appellant's reply brief at 1.) Taken in context, it is clear that Attorney Ulmer was simply explaining that the ultimate decision whether to

accept a plea offer rests with the client: "My sentiments to him were that I did not think it was a bad offer. Now, did I sit there and say, You have to take the offer? Absolutely not. I never do that with somebody, never done it, never will. Just as with the choice of whether or not to take the stand. That's the Defendant's decision, not mine to make." (Notes of testimony, 5/11/11 at 63-64.)

Furthermore, it is clear that the district attorney's offer was a "bottom line" offer and that appellant was not going to accept it regardless of Attorney Ulmer's advice. (***Id.*** at 30-31, 105.) There is no merit to appellant's claim that trial counsel was ineffective with respect to plea negotiations.

Next, appellant argues that trial counsel was ineffective in his cross-examination of Commonwealth witnesses, specifically Trooper LaForme and Corporal Henry. Appellant contends that trial counsel should have cross-examined the officers regarding several alleged discrepancies between their testimony and what appeared on the DVD[1], as well as appellant's allegation that he had suffered abuse at the hands of police. (Appellant's brief at 13-15.)

Attorney Ulmer testified at the PCRA hearing that he was wary of being too aggressive in his cross-examination of the officers because "things don't

[1] The police cruisers were equipped with video cameras which were activated and filmed the pursuit of appellant's vehicle. (PCRA court opinion, 12/29/11 at 2.)

usually work out well when you outright accuse the police of conspiracies." (Notes of testimony, 5/11/11 at 71.) Attorney Ulmer also opined that the DVD essentially spoke for itself and in his mind, it was better to wait until closing argument to point out these various inconsistencies or discrepancies, when the witnesses would no longer have the opportunity to explain them away:

> It was very obvious that the State Police were going to say, yes, he swerved into [sic]. It was very obvious that the defense was going to say, no, it wasn't a swerve. The jurors had eyes. They could see for themselves. We had the DVD. I was able to put in my closing argument the reasonable interpretation that [appellant] did not swerve into them.
>
> And, quite frankly, I believe that to this day, with all due respect to the jurors' verdict. I watched the DVDs. I understand why the police were maneuvering the way they were. I still believe the State Police caused that impact. But why get into an argument with someone you're never going to convince and is going to have an opportunity to emphasize it even more to the jury? You wait until the end, you do it during the closing when nobody can have a chance to explain it away.

Id. at 69-70.

After hearing the testimony, the PCRA court found that Attorney Ulmer's strategy in this regard was reasonable:

> Mr. Ulmer testified that the reason for doing that is he did not want to alienate the jury into believing he was attacking the police officers and that he hoped to have the DVD establish what truly happened and to illustrate that the law enforcement

> officers were either exaggerating or not telling the truth.
>
> Having been involved in significant litigation where law enforcement credibility is called into question in this area, the Court finds that that is an extremely logical and valid trial strategy; that Mr. Ulmer's efforts at using the DVD and arguing in closing, when it could not be rebutted, regarding his arguments that law enforcement were fabricating their stories and puffing was a valid strategy.
>
> In fact as the District Attorney pointed out, the Defendant was acquitted of one of the aggravated assaults which would be an indication that Mr. Ulmer's strategy at least worked in part.

Id. at 100-101.

In fact, Attorney Ulmer did point out various inconsistencies between the officers' trial testimony and the DVD during his closing argument. (Notes of testimony, 3/12/08 at 120-132.) Appellant contends that Attorney Ulmer did not illustrate a contradiction between police testimony that appellant "lunged" or "made an aggressive movement" towards officers upon pulling up to the hospital entrance, and the DVD which did not show such actions. (Appellant's brief at 13-14.) However, Attorney Ulmer did make this argument to the jury: "Trooper Schmit, his account was simply incredible. Yesterday you heard from him that my client was shouting and flailing in the back of Trooper LaForme's vehicle before they took him into the hospital, and that's not what's on the DVD." (Notes of testimony, 3/12/08 at 128.)

Appellant also argues that Attorney Ulmer should have cross-examined the officers regarding a gunshot and why it could not be heard on the police tape. (Appellant's brief at 14.) It was undisputed that Corporal Henry's firearm discharged accidentally during the incident. Why it could not be heard on the DVD does not seem particularly important.[2] At any rate, Attorney Ulmer did point out to the jury that the fact that a shot was fired did not appear in the initial reports. (Notes of testimony, 3/12/08 at 129-130.)

We agree with the PCRA court that Attorney Ulmer's trial strategy was reasonable and that he was not ineffective in his cross-examination of Commonwealth witnesses. Appellant's third claim fails.

Finally, appellant argues that trial counsel was ineffective for failing to call the phlebotomist who drew appellant's blood at the hospital the night of the incident. Appellant posits that the phlebotomist could have contradicted the police officers' testimony concerning appellant's behavior at the hospital.

> To prove that counsel was ineffective for not presenting certain witnesses, a defendant 'must establish the existence of and the availability of the witnesses, counsel's actual awareness, or duty to know, of the witnesses, the willingness and ability of the witnesses to cooperate and appear on the defendant's behalf and the necessity for the proposed testimony in order to avoid prejudice.'

[2] Contrary to appellant's representation of the facts, the gun did not go off inside the officer's vehicle. (Appellant's brief at 14.) Rather, it went off as Corporal Henry was reaching inside appellant's vehicle, struggling with appellant who was seated in the driver's seat. (Notes of testimony, 3/11/08 at 183-184.)

> ***Commonwealth v. Whitney***, 550 Pa. 618, 708 A.2d 471, 480 (1998) (citing ***Commonwealth v. Wilson***, 543 Pa. 429, 672 A.2d 293, 298 (1996)).

Commonwealth v. Spotz, 587 Pa. 1, 48, 896 A.2d 1191, 1219 (2006).

At the PCRA hearing, appellant testified that in his opinion, the phlebotomist could have been a helpful witness because "my behavior wasn't nearly as bad as what the police described." (Notes of testimony, 5/11/11 at 21.) Attorney Ulmer conceded that he never interviewed the phlebotomist but from his perspective, it worked out well because "We didn't have anybody in the hospital saying that he was disruptive, so we could point to that." (***Id.*** at 78.) Attorney Ulmer was also concerned about what he might uncover by speaking with the phlebotomist: "[M]y concern was more that I was going to go and I was going to talk to a phlebotomist who was going to tell me, yeah, this guy was a raging beast." (***Id.*** at 77.) In fact, Attorney Ulmer used the absence of testimony from hospital personnel during his closing argument: "There wasn't a doctor, there wasn't a nurse, there wasn't a patient here to say, yeah, [appellant] was in there, he was making a spectacle of himself, he was causing serious inconvenience, annoyance or alarm." (Notes of testimony, 3/12/08 at 126.)

More importantly, however, as the PCRA court observes, appellant never called the phlebotomist at his PCRA hearing or indicated what her trial testimony would have been; therefore, he cannot possibly demonstrate how he was prejudiced by Attorney Ulmer's failure to call her as a witness.

(PCRA court opinion, 12/29/11 at 5.) Appellant's self-serving testimony that the phlebotomist would have offered favorable testimony is pure speculation. Without any idea what the phlebotomist would have testified to, we cannot determine whether the absence of her testimony prejudiced appellant's case. (***Id.***) The PCRA court did not err in dismissing this claim.[3]

Order affirmed in part and vacated in part. Remanded for new trial on the DUI charges. Jurisdiction relinquished.

[3] Several other claims of trial counsel ineffectiveness, including that counsel prevented appellant from testifying in his own defense, have been abandoned on appeal.