

**NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ROBERT BAKER,	:	
	:	
Appellant	:	No. 2304 EDA 2011

Appeal from the PCRA Order August 1, 2011,  
Court of Common Pleas, Philadelphia County,  
Criminal Division at No. CP-51-CR-0311241-2001

BEFORE: GANTMAN, DONOHUE and PLATT\*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: January 11, 2013

Robert Baker (“Baker”) appeals from the order of court dismissing his petition filed pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. §§ 9541 – 9546. For the following reasons, we affirm.

In 2001, Baker was convicted of third-degree murder, violations of the Uniform Firearms Act, and possessing an instrument of crime. These convictions grew out of an incident in which Baker shot and killed a rival drug dealer. The PCRA court summarized the facts underlying this appeal as follows:

The shooting arose from an argument over drug dealing and territory. [Baker] and decedent knew each other and lived near each other in the Norris Housing Projects ... in the City of Philadelphia. The two were also drug dealers whose territories frequently overlapped, and the night before the shooting, July 8, 2000, [Baker] confronted Ykeem Jackson, who sold drugs for the decedent ... and

\*Retired Senior Judge assigned to the Superior Court.

assaulted him for encroaching on his territory. The next afternoon, at approximately 4 p.m., ... [Baker], while driving his gray Nissan Maxima, was tapped in the back by decedent driving a red, Pontiac Bonneville, and the two men parked and exited their cars in the middle of the block.

After exchanging words, [Baker] fought decedent for about five minutes, with decedent beating him handedly, when Ykeem Jackson's older brother Kareem walked up to the two men and told decedent, 'You don't have to fight him ([Baker]). I'll fight for my brother.' [Baker] responded to Jackson, 'What you think, you're all going to jump me?' and reached under the driver's seat of his car and pulled out a silver revolver.

[Baker's] friend Daryl Furlow ran up to [Baker] and attempted to calm him down, giving decedent and Jackson time to walk away ... . Furlow calmed him down and convinced him to put his gun away, when decedent re-emerged from [an] empty lot ... and started walking up the street [but] away from [Baker].

Furlow stopped decedent in the middle of the block and began talking to him, when [Baker] got back into his car, and drove up within ten feet of where the two men stood. Furlow yelled to [Baker], 'Don't shoot! Don't shoot!' [Baker] shouted, 'What you think[,] I won't kill you motherfucker?', then fired three times at decedent, missed with his first shot, hit decedent in the right thigh with the second shot and in the head as he fell to the ground. [Baker] then drove around the corner ... firing three more times ... and sped away. Decedent was ... rushed to Thomas Jefferson Hospital, where he was pronounced dead shortly after arrival.

After the shooting, [Baker] did not seek medical treatment in Philadelphia. Rather, he sought help from his brother, Monty Campbell, who testified that [Baker] showed up at his door bleeding and said

he had been in a gunfight. Campbell, seeking to avoid the police, drove [Baker] to Charlottesville, Virginia where their mother lived. There, [Baker's] step-father took him to the emergency room at the University of Virginia where their mother lived. When asked how he received the injury, [Baker] told the intake physician he had been shot while 'messing around with a friend and a gun.' However, [Baker] left the hospital before receiving treatment when told that the police would need to question him concerning the nature of his injury. From there, [Baker] fled to Minneapolis, Minnesota, where he stayed for several months before eventually returning to Philadelphia, where he was arrested at his brother's apartment on March 8, 2001 ... pursuant to a warrant.

PCRA Court Opinion, 4/16/12, at 2-4 (citations to notes of testimony omitted).

At the conclusion of a jury trial, Baker was convicted of the above-mentioned crimes. This Court affirmed his judgment of sentence on direct appeal. The Pennsylvania Supreme Court denied Baker's petition for allowance of appeal, and Baker thereafter filed a timely PCRA petition. In his PCRA petition, Baker alleged that his trial counsel was ineffective for agreeing to redact portions of his medical records from the University of Virginia. Baker argues that because he claimed that he shot the victim in self defense, the redacted portions of these medical records were the only "medical evidence" that he had sustained a gunshot wound, and therefore they were vital to his defense. Amended PCRA Petition, 6/28/10, at 2. The

PCRA court dismissed Baker's petition without a hearing on August 1, 2011. This timely appeal followed.

"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. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Walls***, 993 A.2d 289, 294-95 (Pa. Super. 2010) (internal citation omitted).

Baker claims that the PCRA court erred in failing to find his trial counsel ineffective. When reviewing an allegation of ineffective assistance of counsel, we begin with the assumption that counsel was effective. ***Commonwealth v. O'Bidos***, 849 A.2d 243, 249 (Pa. Super. 2004). In order to overcome this presumption, a claimant must establish "that (1) the underlying claim is of arguable merit; (2) that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate the appellant's interest; and finally, (3) that counsel's action or inaction was prejudicial to the client." ***Id.*** In order to establish prejudice, an appellant must demonstrate "that there is a reasonable probability that, but for the act or omission challenged, the outcome of the proceeding would have been different." ***Commonwealth v. Meadows***, 567 Pa. 344, 356, 787 A.2d 312, 319 (2001). If the claimant fails to establish any one of the three ineffectiveness prongs, his challenge must fail. ***O'Bidos***, 849 A.2d at 249.

Baker argues on appeal, as he did in the PCRA court, that his trial counsel was ineffective for agreeing to redact all statements in the University of Virginia hospital records that the laceration on his forehead was caused by a gunshot wound. Baker acknowledges that these statements are hearsay but argues that his trial counsel should have sought their admission, pursuant to the hearsay exception contained in Pa.R.E. 803(4), to prove that his injury was diagnosed as a gunshot wound. Appellant's Brief at 12-13. The rule upon which Baker relies provides as follows:

**Statements for purposes of medical diagnosis or treatment.** A statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

Pa.R.E. 803(4). This Rule "allows for the admission of statements made for purpose of medical diagnosis or treatment, regardless [of] whether the declarant is available as a witness." *Commonwealth v. D.J.A.*, 800 A.2d 965, 975 (Pa. Super. 2002). This Court has described the limits of this hearsay exception in the following manner:

Under the medical treatment exception to the hearsay rule, '[a] statement made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as

reasonably pertinent to treatment, or diagnosis in contemplation of treatment' is not excluded from evidence by the hearsay rule. Pa.R.E. 803(4). 'Medical records are admissible under the hearsay rules as evidence of facts contained therein **but not as evidence of medical opinion or diagnosis.**' *Folger v. Dugan*, 876 A.2d 1049, 1055 (Pa. Super. 2005).

*Turner v. Valley Hous. Dev. Corp.*, 972 A.2d 531, 537 (Pa. Super. 2009) (emphasis added). Thus, if Baker sought to use the hospital records to establish that he made statements to the treating medical professionals that he had a gunshot wound, the hospital records should have been admitted. However, that is not the purpose for which Baker sought to use these medical records. Baker wanted to use the statements contained in these records to establish that there had been a medical diagnosis of a gunshot wound, which he believes would have bolstered his justification defense. *Id.* at 14-15. As articulated in his 1925(b) statement,

... [t]rial counsel was ineffective for agreeing to stipulate to the redaction of exculpatory evidence from [Baker's] University of Virginia Health System medical records that contained a medical opinion by Attending Physician Andrew Perron and other hospital personnel that [Baker] had a gunshot graze wound to the forehead where [Baker] alleged at trial that he acted in self-defense and where the prosecution argued that [Baker] had not been shot.

PCRA Court Opinion, 4/16/12, at 4. This purported use of these medical records is clearly not allowable under Pa.R.E. 803(4), as medical records are

not admissible under that rule “as evidence of medical opinion or diagnosis.” **Turner**, 972 A.2d at 537.

Having found no merit to the underlying claim, Baker’s ineffectiveness claim must fail.<sup>1</sup> **O’Bidos**, 849 A.2d at 249. We therefore find no error with the PCRA court’s determination to dismiss his PCRA petition.

Order affirmed.

Platt, J. concurs in the result.

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<sup>1</sup> Baker does not present argument regarding the admissibility of these statements pursuant to any other hearsay exception. We will not *sua sponte* consider whether the statements at issue could have been admitted for Baker’s intended purpose under another rule of evidence, as this court will not develop arguments on an appellant’s behalf. **Commonwealth v. Gould**, 912 A.2d 869, 873 (Pa. Super. 2006).