NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. SHANE ALVIN GEEDY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 237 MDA 2012

Appeal from the Order January 3, 2012
In the Court of Common Pleas of Cumberland County
Criminal Division at No(s): CP-21-CR-0001993-2006

BEFORE: MUNDY, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.: Filed: January 3, 2013

Appellant, Shane Alvin Geedy, appeals from the January 3, 2012 order denying his petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. After careful consideration, we affirm.

We summarize the pertinent procedural history of this case as follows. Appellant was convicted by a jury of first-degree murder[1] on September 13, 2007, and sentenced to life in prison by the trial court on October 9, 2007. On direct appeal, Appellant challenged, *inter alia*, the trial court's refusal of his request to charge the jury with a "heat of passion" voluntary manslaughter instruction. This Court affirmed Appellant's judgment of

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 2502(a).

sentence on August 3, 2009, and our Supreme Court denied Appellant's petition for allowance of appeal on March 16, 2010. ***Commonwealth v. Geedy***, 984 A.2d 1012 (Pa. Super. 2009) (unpublished memorandum), *appeal denied*, 991 A.2d 310 (Pa. 2010).

On March 23, 2011, Appellant filed a timely counseled PCRA petition. A hearing on Appellant's petition was held on June 2, 2011. On January 3, 2012, the PCRA court denied Appellant's petition for PCRA relief for lack of merit. Appellant filed a timely notice of appeal on January 30, 2012.[2]

On appeal, Appellant raises the following question for our consideration.

> I. Did the trial court err in not finding trial counsel ineffective for not preserving a federal constitutional question/objection on the issue of the voluntary manslaughter insruction [sic]?

Appellant's Brief at 6.

We begin by noting the following standard of review, guiding our consideration of this appeal. "On appeal from the denial of PCRA relief, our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error." ***Commonwealth v. Calhoun***, 52 A.3d 281, 284 (Pa. Super. 2012) (citation omitted). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. Garcia***, 23 A.3d 1059,

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[2] Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

1061 (Pa. Super. 2011) (internal quotation marks and citation omitted), *appeal denied*, 38 A.3d 823 (Pa. 2012). "The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to our plenary review." ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009) (internal quotation marks and citations omitted).

In addition, when reviewing a claim of ineffective assistance of counsel we apply the following test.

> It is well-established that counsel is presumed effective, and the defendant bears the burden of proving ineffectiveness. To overcome this presumption, Appellant must satisfy a three-pronged test and demonstrate that: (1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance. A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any of these prongs.

Commonwealth v. Williams, 980 A.2d 510, 520 (Pa. 2009) (citations omitted), *cert. denied,* ***Williams v. Pennsylvania***, 130 S. Ct. 3353 (2010). Further, prejudice from such deficient performance results only if, "but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." ***Commonwealth v. Zook***, 887 A.2d 1218, 1227 (Pa. 2005) (citation omitted).

Trial counsel clearly sought an instruction from the trial court for voluntary manslaughter based on his contention that the evidence was

sufficient to put the issue of provocation before the jury and he challenged the trial court's denial on appeal. ***See Geedy***, ***supra*** at slip op. at 4. Nevertheless, Appellant now contends that trial counsel was ineffective for failing to couch the issue in constitutional terms.

> Here, trial counsel raised an objection as to the instruction on voluntary manslaughter, but failed to articulate any constitutional objections. In particular, a constitutional objection should have been made to the failure of the trial court to give a manslaughter instruction. The Constitutional issued [sic] trial counsel should have raised are a type of ***Apprendi***[3] claim.

Appellant's Brief at 12.

The Commonwealth asks this Court to affirm the PCRA court on the basis that Appellant's claim has been previously litigated. Commonwealth's Brief at 11.

> [P]ostconviction review of claims previously litigated on appeal cannot be obtained by alleging ineffective assistance of counsel and by presenting new theories of relief to support previously litigated claims.
>
> The defendant in this case should be barred from PCRA relief because the issue being raised was previously litigated and denied by this Honorable Court not only under a similar theory but the same exact theory.

Id. at 11-12 (citation omitted).

> [A] petitioner must demonstrate that the issues raised in his PCRA petition have not been

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[3] ***Apprendi v. New Jersey***, 530 U.S. 466 (2000).

> previously litigated or waived. [42 Pa.C.S.A.] § 9543(a)(3). An issue has been previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." ***Id.*** at § 9544(a)(2). A PCRA claim is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." ***Id.*** at § 9544(b).

Commonwealth v. Martin, 5 A.3d 177, 182-183 (Pa. 2010), *cert. denied*, ***Martin v. Pennsylvania***, 131 S. Ct. 2960 (2011).

Our Supreme Court has made clear, however, that a claim of ineffective assistance of counsel is distinct from the underlying claim of trial court error. ***See Commonwealth v. Collins***, 888 A.2d 564, 570 (Pa. 2005) (holding that a PCRA claim of ineffectiveness raises a distinct legal ground from underlying trial error and that a PCRA court should review ineffectiveness claims under the three-prong standard announced in ***Commonwealth v. Pierce***, 527 A.2d 973 (Pa. 1987)). ***See also Commonwealth v. Paddy***, 15 A.3d 431, 449 n.11 (Pa. 2011) (noting trial court erred in construing Appellant's claims of ineffective assistance of counsel as direct claims of trial court error, which were waived or previously litigated). Nevertheless, the previously litigated issue of trial court error is relevant to whether Appellant can sustain his burden to prove ineffectiveness. "[W]e have indicated that while the underlying claim of trial court error is relevant to assessing a claim of ineffectiveness, it is only relevant to the extent that it impacts assessment under the three prong

ineffectiveness test." ***Collins***, **supra** at 571. When such underlying claim has been previously litigated, a claim of ineffectiveness of counsel grounded on that claim, "in many cases, will fail for the same reasons as it failed on direct appeal." ***Id.*** at 574-575. Accordingly, we decline to find Appellant's claim previously litigated or waived under Section 9543(a)(3) and proceed to the merits of Appellant's ineffective assistance of counsel claim under the three-part ***Pierce*** test.

Appellant claims that his trial/direct-appeal counsel should have argued for the voluntary manslaughter charge on the constitutional basis articulated in the United States Supreme Court's decision in ***Apprendi***. Appellant's Brief at 12.

> This Court must keep in mind that voluntary manslaughter is an intentional killing, and after a jury has found all the elements for first degree, than [sic] a jury question of provocation is next in line. Denying an instruction of provocation removes the juries [sic] ability to see if the first degree murder is entitled to a "downgrade" to the lesser crime based on an additional finding.

Id. However, Appellant misinterprets ***Apprendi***.

In ***Apprendi***, the United States Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, ***supra*** at 490-491. Appellant essentially confuses a grading issue with the sentencing

enhancement issue addressed in ***Apprendi***. We have addressed this distinction before.

> In ***Apprendi***, the United States Supreme Court was called upon to determine whether a jury finding was required before a penalty could be imposed under a New Jersey statute that provided for an extended sentence of ten to twenty years in addition to the sentence for the underlying offense if the crime was deemed to have been a hate crime. ***Id.*** at 469[]. The Court held that any fact, other than a prior conviction, that enhances the penalty for a crime beyond the statutory maximum must be submitted to a jury. ***Id.*** at 490[]. As the present case concerns the propriety of the grading of the offense which thereby establishes the maximum penalty, and not an enhancement to the sentence beyond the statutory maximum penalty [] we conclude that ***Apprendi*** does not apply.

Commonwealth v. Chambers, 852 A.2d 1197, 1200 (Pa. Super. 2004), *appeal denied*, 871 A.2d 188 (Pa. 2005), *quoting* ***Commonwealth v. Shamberger***, 788 A.2d 408, 418 n.11 (Pa. Super. 2001) (*en banc*), *appeal denied*, 800 A.2d 932 (Pa. 2002).

In the instant case, the jury was presented with, and instructed on, all of the elements necessary to establish first-degree murder. The jury found those elements proven beyond a reasonable doubt. Accordingly, Appellant's maximum sentence was not determined by factors not passed on by the jury. Accordingly, we conclude ***Apprendi*** is inapposite. In ***Chambers***, addressing a similar contention we held as follows.

> [***Apprendi***] dealt with sentence enhancement based upon facts which had not been determined by the jury in the course of rendering a verdict. Since the

> jury in the instant case was properly charged with the task of delivering a verdict as to whether appellant was guilty of second degree murder and all evidence had been submitted to it relative to the charge, the due process violation found to exist in [] ***Apprendi*** did not occur.

Id.

In light of the foregoing, we conclude Appellant has failed to prove the first prong of his ineffectiveness of counsel claim, that his underlying claim had merit. ***See Williams***, ***supra***. We discern no abuse of discretion or error of law by the PCRA court in denying Appellant PCRA relief.

Order affirmed.