

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

WILFREDO VALENTIN

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2368 EDA 2011

Appeal from the PCRA Order August 8, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0908561-2003
CP-51-CR-0908581-2003

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY PANELLA, J.

Filed: February 13, 2013

Appellant, Wilfredo Valentin, appeals from the order entered by the Honorable Linda A. Carpenter, Court of Common Pleas of Philadelphia County, that denied his request for relief pursuant to the Post Conviction Relief Act. After careful review, we affirm.

As we write only for the parties, a detailed recitation of the factual and procedural history of the case is unnecessary. We therefore will set forth only so much of such history as is necessary to resolve the issues before us. Valentin was in police custody on unrelated charges when he allegedly overdosed on Xanax. Valentin was taken to a local hospital for treatment and returned to police custody approximately 6 hours later.

Detective Gregory Pinto testified that upon his return to police custody, Valentin was lethargic and "dopey." Detective Pinto decided not to

question Valentin at the time, and instead ensured that Valentin received a steak sandwich for lunch. At approximately 2:30 that afternoon, Detective Pinto observed that Valentin appeared to be “more with it.” During this interrogation, Valentin admitted to a series of robberies and burglaries, including a home invasion and robbery that form the basis of the convictions at issue in this PCRA appeal.

After a trial, a jury convicted Valentin of felony conspiracy, aggravated assault, and three counts of carrying a firearm without a license. The trial court subsequently sentenced Valentin to a period of incarceration of 90 to 180 months, to be followed by 5 years of probation. This court affirmed Valentin’s judgment of sentence on August 23, 2007.

Valentin subsequently filed a timely *pro se* PCRA petition raising multiple issues. The PCRA court appointed counsel to represent Valentin, and counsel filed an amended petition raising a single issue. A hearing on Valentin’s petition was held on June 7, 2011, and after notice, the trial court dismissed Valentin’s petition *via* order dated August 8, 2011. Valentin filed a timely appeal, and after a change of appointed counsel, Valentin filed a statement of issues on appeal. The statement of issues on appeal included several issues of PCRA counsel ineffectiveness, including allegations based upon a failure to preserve issues raised in Valentin’s *pro se* petition. The PCRA court found all issues save one waived for failure to preserve. On the

single remaining issue, the PCRA court found that Valentin had failed to establish prejudice.

In his appellate brief, Valentin raises six issues for our review. As an initial matter, we must determine whether any of these issues have been preserved for our review. As a general rule, claims alleging ineffectiveness of PCRA counsel may not be raised for the first time on appeal from the dismissal of the PCRA petition. **See *Commonwealth v. Colavita***, 606 Pa. 1, 32, n. 12, 993 A.2d 874, 893, n. 12 (2010); ***Commonwealth v. Ford***, 993 A.2d 874 (Pa. Super. 2012). Furthermore, the record does not reveal that Valentin raised these issues in a written response to the PCRA court's notice of intent to dismiss. **Cf. *Commonwealth v. Rykard***, 55 A.3d 1177 (Pa. Super. 2012). However, Valentin argues that the Supreme Court of Pennsylvania is likely to revisit this precedent in light of ***Martinez v. Ryan***, 132 S.Ct. 1309, 162 L.Ed.2d 129 (2012). In ***Martinez***, the Supreme Court of the United States held that federal courts may entertain *habeas corpus* petitions alleging ineffectiveness of PCRA counsel where the state courts provide no forum to hear such a claim. **See *Martinez***, at 1317. Accordingly, Valentin predicts that the Supreme Court of Pennsylvania will create a forum for hearing such claims so as to retain jurisdiction of them.

While we think that Valentin's prediction has merit,¹ we conclude that a three judge panel of the Superior Court, an intermediate appellate court, is not the appropriate forum for creation of such a new right of jurisdiction. Either the legislature or the Supreme Court of Pennsylvania is a preferable forum for weighing the policy concerns involved and setting forth the procedural rules involved. Furthermore, until such time as one of those forums addresses the issue, Valentin will have access to the federal courts through a *habeas corpus* petition to address these claims. Accordingly, like the PCRA court, we conclude that Valentin's issues raising ineffectiveness of PCRA counsel are waived, and do not reach them.

Turning to the single issue preserved for appeal, Valentin contends that the PCRA court erred in concluding that he had failed to establish prejudice flowing from his claim that his trial counsel was ineffective for failing to present to the jury expert testimony on the effect of Valentin's use of Xanax prior to his confession. Our standard of review of a PCRA court's denial of a petition for post-conviction relief is well-settled: we are "limited to whether the trial court's determination is supported by the evidence of record and whether it is free of legal error." ***Commonwealth v. Hall***, 867 A.2d 619, 628 (Pa. Super. 2005) (citing ***Commonwealth v. Allen***, 557 Pa.

¹ As does the Commonwealth, which does "not object to this matter being remanded to the PCRA court, in accordance with the ***Martinez*** decision, for the *limited purpose*" of addressing Valentin's claims of PCRA counsel ineffectiveness. Appellee's Letter Brief, at 10 (emphasis in original).

135, 142, 732 A.2d 582, 586 (1999)), **appeal denied**, 586 Pa. 756, 895 A.2d 549 (2006). We give great deference to the PCRA court's findings and will disturb them only if they have no support in the certified record. **See Commonwealth v. Boyd**, 923 A.2d 513, 515 (Pa. Super. 2007), **appeal denied**, 593 Pa. 754, 932 A.2d 74 (2007). Our scope of review is limited by the parameters of the PCRA, and we may affirm the decision of the trial court if there is any basis on the record to support the trial court's action. **See Commonwealth v. Brooks**, 875 A.2d 1141, 1144 (Pa. Super. 2005) (citing **Commonwealth v. Heilman**, 867 A.2d 542, 544 (Pa. Super. 2005), **appeal denied**, 583 Pa. 669, 876 A.2d 393 (2005)).

Counsel is presumed effective and, as such, Valentin bears the burden of establishing his claim that his trial counsel was ineffective. **See Commonwealth v. Hall**, 549 Pa. 269, 290, 701 A.2d 190, 200-201 (1997). Specifically, to prove ineffective assistance of his trial counsel, Valentin must show (i) that the underlying claim is of arguable merit; (ii) that counsel had no reasonable basis designed to effectuate Valentin's interests for the act or omission in question; and (iii) that counsel's ineffectiveness actually prejudiced Valentin. **See Commonwealth v. Snyder**, 870 A.2d 336, 345 (Pa. Super. 2005). "A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim." **Commonwealth v. Morrison**, 878 A.2d 102, 105 (Pa. Super. 2005) (citation omitted).

As noted previously, the PCRA court found that Valentin had failed to establish the third prong, actual prejudice. After reviewing the record, we conclude that Valentin does not even establish the first prong, arguable merit. Valentin argues that the testimony of David Leff, an expert on the use and effects of Xanax, would have clearly undercut the credibility of Valentin's confession, which is the keystone of the evidence presented that supports his conviction for conspiracy. While it is indeed arguable that Leff's testimony would have had the effect Valentin believes it would, we need not reach this issue, as Valentin has not established that it would have been admissible at trial.

At the suppression hearing, Valentin laid a foundation for Leff's expert opinion by testifying that he had ingested 48 Xanax tablets after being arrested. **See** N.T., Suppression hearing, 2/25/2005, at 123. Based upon this testimony, Leff opined that Valentin could possibly still have been under the acute influence of Xanax during his confession. **See id.**, at 169.

In contrast, Valentin waived his right to testify in his own defense at trial. **See** N.T., Trial, 3/1/2005, at 198-202. Furthermore, while the testimony of Detective Pinto implies that Valentin had been under the influence of something that affected his speech and rendered him doopey and lethargic, there is no testimony at trial capable of establishing that Valentin had taken Xanax while in custody, let alone 48 tablets. Accordingly, there would have been no foundation for Leff's opinion, and the record of the PCRA

proceedings reveals no argument that trial counsel was ineffective for failing to put Valentin on the stand.² We therefore conclude that trial counsel was not ineffective for failing to call an expert when that expert's testimony would not have been admissible. Valentin's sole preserved issue on appeal merits no relief.

Order affirmed. Jurisdiction relinquished.

² Several of the issues raising ineffectiveness of PCRA counsel that we found waived above are based upon allegations that trial counsel failed to procure other sources for providing a foundation for Leff's opinion testimony. However, as noted above, these issues were raised for the first time on appeal and we may not consider them at this time.