NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WALI SHABAZZ,	:	No. 2668 EDA 2011
Appellant	:	

Appeal from the PCRA Order, September 2, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-10071111-2002

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND SHOGAN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 19, 2013

Appellant, Wali Shabazz, appeals ***pro se*** the order denying relief as to his second petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Finding no merit in the issues raised on appeal, we will affirm the order below.

On June 28, 2004, a jury convicted appellant of second degree murder, burglary, and a violation of the Uniform Firearms Act. The basis for these convictions was accurately summarized by a prior panel of this court during appellant's direct appeal:

> The record reveals that at 5:30 p.m. on July 27, 2002, Kenneth Cuff was entertaining two guests in the living room of his home at 5064 Ogden Street in Philadelphia when the victim, Andre Thompson, who resided with Mr. Cuff, opened the front door, sat down next to Mr. Cuff, and announced, "[T]hat doggone Wali is something else." N.T. Trial,

> 6/23/04, at 86. Approximately five minutes later, Appellant burst through the front door carrying a large revolver and asked, "Where is he at?" ***Id.*** at 93. Mr. Cuff replied, "Who are you talking about?" ***Id.*** Without answering, Appellant walked over to Mr. Thompson and struck him in the face with the revolver. Mr. Cuff backed away and watched as the two men struggled for control of the gun. Appellant eventually broke free, stepped back, and fired one shot at close range, wounding Mr. Thompson in the abdomen. Appellant fled the scene, and rescue personnel were summoned to the house.
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> Mr. Thompson was transported to the hospital of the University of Pennsylvania where he died approximately three hours later. An autopsy revealed that the victim bled to death because the bullet pierced several organs and a series of "major blood vessels," resulting in massive blood loss. N.T. Trial, 6/25/04, at 29. The medical examiner also observed a laceration near Mr. Thompson's right eyebrow, which was consistent with an injury inflicted by a blunt object such as a steel handgun. ***Id.*** at 32-34.
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> During the ensuing investigation, Mr. Cuff gave police a physical description of Appellant, indicated that the shooter's name was "Wali," and identified Appellant from a photograph that was shown to him by Philadelphia Police Detective Matthew Myles. N.T. Trial, 6/23/04, at 45. Appellant was subsequently arrested, and the case proceeded to a jury trial where Mr. Cuff provided an eyewitness account of the incident. In addition, Azeem Johns, a drug dealer who was in federal prison on a weapons charge, testified that Appellant had admitted shooting a "crack fiend" inside Mr. Cuff's house because the man "had disrespected [Appellant] in some type of way." N.T. Trial, 6/24/04, at 59-60.

Commonwealth v. Shabazz, No. 3038 EDA 2006, slip memorandum (Pa.Super., January 4, 2008) at 1-2.

Although appellant filed a timely notice of appeal, his appeal was dismissed on April 6, 2005 when appointed counsel failed to file a brief. On January 3, 2006, appellant filed his first PCRA petition, seeking restoration of his direct appeal rights. Those rights were restored and appellant filed a new notice of appeal on October 16, 2006. On January 4, 2008, this court affirmed the judgment of sentence, and on September 3, 2008, our supreme court denied appeal. ***Commonwealth v. Shabazz***, 947 A.2d 832 (Pa.Super. 2008) (unpublished memorandum), ***appeal denied***, 598 Pa. 766, 956 A.2d 434 (2008).

On June 12, 2009, appellant timely filed the instant PCRA petition. Appointed counsel entered his appearance on May 17, 2010. On February 22, 2011 and May 12, 2011, appellant filed ***pro se*** pleadings seeking to change or remove appointed counsel. On June 15, 2011, counsel file a "no-merit" brief and petition to withdraw pursuant to ***Turner***-***Finley*** practice. ***See Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (***en banc***). On June 20, 2011, the PCRA court issued its first 20-day notice, pursuant to Pa.R.Crim.P., Rule 907, 42 Pa.C.S.A., of its intention to dismiss the petition without hearing. Appellant filed an initial ***pro se*** response on July 8, 2011, and a supplementary ***pro se*** response on July 28, 2011. Therein, in addition to other issues, appellant citied ***Commonwealth v. Friend***, 896 A.2d 607 (Pa.Super. 2006), and argued that counsel's attempt

to withdraw was ineffective assistance because counsel's letter to appellant had not informed him that upon withdrawal, appellant could proceed ***pro se***, hire new counsel, or not at all. Thereafter, the PCRA court re-issued its Rule 907 notice on August 4, 2011, and appellant re-filed his ***pro se*** supplementary response on August 23, 2011. Ultimately, the PCRA court entered an order on September 2, 2011, dismissing appellant's petition and permitting counsel to withdraw. Appellant now brings this timely ***pro se*** appeal.

Appellant raises the following issues on appeal:

> i. Is the appellant entitled relief in the form of an evidentiary hearing and or new trial where direct appellant counsel David S. Rudenstein failed to argue on direct appeal to the superior court, trial court's abuse of discretion for failure to give jury proper cautionary instruction after commonwealth's witness provided jury with prejudicial testimony. Was appellant counsel ineffective for failure to properly address issue at direct appeal proceedings?
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> ii. Is the appellant entitled relief in the form of an evidentiary hearing and or new trial, where trial court erred when she gave the jury an improper and inadequate cautionary instruction, after federal witness's prejudicial testimony. [sic] Was the instruction to [sic] vague to cure the prejudicial effect?
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> iii. Is the appellant entitled relief in the form of an evidentiary hearing and or new trial, where trial counsel failed to request secondary cautionary instruction after trial court's first inadequate instruction to the jury when prejudicial testimony was presented by

> [C]ommonwealth's witness. [sic] Was trial counsel ineffective for performing in a deficient manner. [sic]
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> iv. Is appellant entitled relief in the form of an evidentiary hearing and or new trial where prosecution's comments where [sic] extremely prejudicial towards petitioner during closing arguments forming in the jury's mind fixed bias, and hostility to render a true verdict. [sic] Was prosecution[‘s] remarks prejudicial to effect [sic] the jury's decision?
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> v. Is appellant entitiled [sic] relief in the form of an evidentiary hearing and or new trial where trial counsel failed to raise objection, request mistrial, or a cautionary instruction after prosecution’s prejudicial remarks during closing arguments. [sic] Was trial counsel ineffective for failing to comply with the standard of minimum competent counsel?
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> vi. Is appellant entitiled [sic] relief in the form of an evidentiary hearing and or new trial where trial counsel failed to adequately investigate commonwealth's witness when it was necessary, for proper cross-examination. [sic] Was trial counsel ineffective for his defection in investigating witness that would have helped defense[?]
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> vii. Is appellant entitled relief in the form of an evidentiary hearing and or new trial, where PCRA counsel's defect in finley letter, and also counsel erred in not properly reviewing PCRA petition and also amending ineffective counsel claims. [sic] Was PCRA counsel ineffective for his above failure?

Appellant’s brief at 4-5.

Our standard of review for an order denying post-conviction relief is whether the record supports the PCRA court’s determination, and whether

the PCRA court's determination is free of legal error. ***Commonwealth v. Franklin***, 990 A.2d 795, 797 (Pa.Super. 2010). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

Moreover, as some of appellant's issues on appeal are stated in terms of ineffective assistance of counsel, we also note that appellant is required to make the following showing in order to succeed with such a claim: (1) that the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, 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. Rivera***, 10 A.3d 1276, 1279 (Pa.Super. 2010). The failure to satisfy any prong of this test will cause the entire claim to fail. ***Commonwealth v. Daniels***, 947 A.2d 795, 798 (Pa.Super. 2008). Finally, counsel is presumed to be effective, and appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa.Super. 2003).

Appellant's first three issues are all based upon a contention that a curative instruction given by the trial court to remedy the prejudice rendered by certain testimony was inadequate to rectify the harm. Issue number two claims trial court error in this regard, while issues one and three layer claims

of ineffective assistance of trial and appellate counsel in failing to challenge the instruction at trial or on appeal.[1]

The testimony at issue was that of Azeem Johns, a police informant and prosecution witness. Johns was to testify that appellant informed him that he shot the victim because the victim was disrespecting him and was selling drugs out of Mr. Cuff's house and he wasn't supposed to be doing that on the block. (Notes of testimony, 6/24/04 at 12.) Before Johns testified, the Commonwealth sought permission to have Johns testify to the fact that appellant and Johns had previously been dealing drugs on the block. The Commonwealth argued that without that additional information, the jury might assign some altruistic crime fighter motive for appellant's actions, rather than the motive of being a rival drug dealer. (***Id.*** at 4-16.) Ultimately, the court permitted the Commonwealth to elicit testimony that Johns and appellant had previously dealt drugs on the block. (***Id.*** at 14-16.) However, when Johns eventually testified Johns stated not only that he and appellant had previously sold drugs on the block, but that appellant had sold drugs on the block on the day of the shooting. (***Id.*** at 52.) Counsel for

[1] We note that a related issue, whether the underlying testimony was improperly prejudicial, was litigated on direct appeal. Obviously, appellant cannot litigate the issue of trial court error in this regard because the waiver provisions of the PCRA require that appellant have raised this issue on direct appeal. ***See*** 42 Pa.C.S.A. §§ 9543(a)(3), 9544(b). Nonetheless, we will entertain the ineffectiveness claims because they could not be raised until now, and are distinct from the underlying claim that was raised on appeal. ***See Commonwealth v. Collins***, 585 Pa. 45, 60-61, 888 A.2d 564, 573 (2005).

appellant immediately objected and asked for a mistrial. (***Id.*** at 52-53.) The court denied a mistrial but agreed to instruct the jury to disregard the statement, which instruction was immediately given. (***Id.*** at 53.)

On appeal appellant argues that the instruction was insufficient to cure the prejudice and that trial counsel was ineffective in settling for that remedy and direct appeal counsel was ineffective in failing to pursue the issue on appeal. We find no error here.

The admission of evidence is at the discretion of the trial court and we will reverse only upon a showing of an abuse of that discretion. ***Commonwealth v. Glass***, 50 A.3d 720, 724-725 (Pa.Super. 2012). Evidence of prior bad acts or crimes is admissible to prove motive. ***Commonwealth v. Ross***, 57 A.3d 85, 98 (Pa.Super. 2012); Pa.R.E., Rule 404(b)(2), 42 Pa.C.S.A.

Instantly, given Johns' testimony that appellant shot the victim because he was selling drugs out of Mr. Cuff's house and should not be doing that, it was vital that the Commonwealth be permitted to also show that appellant had previously sold drugs on the block; otherwise, the jury may have improperly attributed some heroic motive to appellant's actions. That being said, Johns' testimony improperly went beyond the scope that the trial court had allowed when he testified that appellant had sold drugs on the day of the shooting. Nonetheless, the prejudice involved in this further information is nearly insignificant. The gravest prejudice to appellant was in

allowing the jury to be told that he was a drug dealer in the first place. However, as we have already analyzed, that information was necessary. The prejudice arising from the knowledge that appellant may have sold drugs on the day of the shooting carries almost no prejudice beyond that imparted by the prior revelation. We find that the trial court's instruction to disregard the statement completely removed any prejudice from the additional statement. There is no error or ineffectiveness on the part of counsel in this regard.

In his fourth issue, appellant asserts that the prosecution committed misconduct in its closing argument by offering personal opinion as to appellant's guilt. In his fifth issue, appellant claims that trial counsel was ineffective in failing to object to the comments. Appellant's fourth issue is waived because it could have been raised during appellant's direct appeal. ***See*** 42 Pa.C.S.A. §§ 9543(a)(3), 9544(b). As to appellant's fifth issue, we find no merit. The offending remarks are underlined in the following excerpts from the Commonwealth's closing:

> There's a second type of manslaughter called voluntary manslaughter, that being the heat of passion. We talk about heat of passion. Heat of passion is literally I mean to kill you, but I have an excuse for doing it. It is that type of excuse that the law recognizes as such that somehow you were under such an overwhelming stimulus that you didn't have time to correct your thoughts to stop this killing. You think about it, if you were to leave work early and you were to go to your child's daycare to pick your child up and you surprise the daycare provider and you entered in from the back door, and

> you see that daycare provider sexually assaulting your child, you have your gun on you that you're licensed to carry. You take that gun out; you kill that person and you mean to kill that person because what that person did so overwhelmed my thought process that in the heat of passion I didn't have the time for cool reflection, I killed that person. The type is almost -- you think of it is almost like temporary insanity. Compare that to this, what we have here. There's an argument; he walks off. He's gone for ten minutes and he comes back with a gun and kills. Is that the type of conduct that's not murder? Should everyone now know with this defendant, this particular circumstances that having an argument with Wali Shabazz is like the Surgeon General's Warning, it's hazardous to your health, that if you could just argue with the person, you then have a license to kill? I would suggest no. No. This is nowhere near what the law recognizes as heat of passion, voluntary manslaughter. And if it's not manslaughter, then we have to talk about murder.

Notes of testimony, 6/28/04 at 80-82 (emphasis added).

> You know that when he left that argument, he had a number of choices and decisions to make. If he just wanted to strike this man, he could have gone to the playground. He could have picked up a bottle, a brick, a bat anything to just hit, assault, strike this man. But that's not what he did. He left and he got this cannon of a gun, a Dirty Harry-sized gun and he went and he got that gun and he knew that he wasn't supposed to have that gun. He knew that and he got it any way. And he took that gun. When he had the opportunity to think about what he's about to do, think about whether or not going into this house and confronting this man over this simple argument whatever it was outside, he knew when he got that gun what he was going to do with it.

Notes of testimony, 6/28/04 at 85-86 (emphasis added).

> And if you had any doubt whatsoever about that, any question as to whether or not it was with or without

> the specific intent to kill, you know what he said about it afterwards. He disrespected me. For disrespecting Wali Shabazz, you get to lose all of your tomorrows. For disrespect.

Notes of testimony, 6/28/04 at 89 (emphasis added).[2]

We agree with appellant that a prosecutor is forbidden to offer his or her personal opinion as to the guilt of the defendant, however:

> While it is improper for a prosecutor to offer any personal opinion as to the guilt of the defendant or the credibility of the witnesses, it is entirely proper for the prosecutor to summarize the evidence presented, to offer reasonable deductions and inferences from the evidence, and to argue that the evidence establishes the defendant's guilt. In addition, the prosecutor must be allowed to respond to defense counsel's arguments, and any challenged statement must be viewed not in isolation, but in the context in which it was offered. "[The] prosecutor must be free to present his or her arguments with logical force and vigor," and comments representing mere oratorical flair are not objectionable.

Commonwealth v. Thomas, ___ Pa. ___, ___54 A.3d 332, 338 (2012) (citations omitted).

None of the indicated remarks represents the prosecutor's personal opinion as to appellant's guilt. In the first set of statements pertaining to the Surgeon General's Warning and the license to kill, the prosecutor was merely highlighting that the sort of argument that occurred between

[2] Appellant's brief also refers to a statement about the jury never getting a chance to meet the victim. However, that statement was not raised in the concise statement of errors complained of on appeal and any argument pertaining to it is waived. Pa.R.A.P., Rule 1925(b)(4)(vii), 42 Pa.C.S.A.

appellant and the victim was not of a nature that would amount to heat of passion that would reduce culpability to voluntary manslaughter. The prosecution indicated, appropriately, that a mere argument does not justify (a license to kill) killing someone.

In the second comment, pertaining to Dirty Harry, the prosecution was not even referring to appellant, but to the size of his gun. The prosecution was merely showcasing that appellant armed himself with a weapon that was likely to kill rather than merely injure.

Finally, in the third statement, pertaining to losing all of your tomorrows for merely disrespecting appellant, the prosecutor was essentially arguing that the malice element was met by the evidence. In sum, none of these remarks amounted to prosecutorial misconduct, but served legitimate purposes, and were, at most, oratorical flair. Counsel was not ineffective in failing to object to these remarks.

In his sixth argument, appellant argues that trial counsel was ineffective in failing to investigate Azeem Johns. We may quickly dismiss this argument. The trial court notes that appellant first raised this claim in a letter to counsel dated August 3, 2010. That letter contains a bald claim that counsel was ineffective for failing to investigate Johns, but fails to state what counsel could have uncovered had he investigated Johns. Appellant's supplemental response to the Rule 907 notice also claims that trial counsel was inadequate in failing to investigate and call witnesses, but fails to name

those witnesses and describe their potential testimony. We can find nothing in the pleadings below where appellant revealed how an investigation of Johns could have helped his case. Thus, the PCRA court correctly found no ineffectiveness on this issue because appellant failed to offer any proof as to prejudice.

Only now on appeal does appellant elaborate on this issue. Appellant notes that Johns testified that on the day of the shooting, he saw appellant in an automobile, with two other individuals named Eric and Ant. (Notes of testimony, 10/24/04 at 58.) Appellant now baldly claims that had counsel investigated these two other men, he would have discovered that one of them was incarcerated at the time. (Appellant's brief at 53.) First, by elaborating on this issue now and not before the PCRA court, appellant is effectively raising the issue for the first time on appeal. Issues that are raised for the first time on appeal are waived. Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A. Second, even if not waived, the prejudice is ***de minimis***. Such information, if true, would provide only minimal impeachment. We see no basis for finding that trial counsel was ineffective in this regard.

In his seventh and final argument, citing ***Commonwealth v. Friend***, 896 A.2d 607 (Pa.Super. 2006), appellant contends that PCRA counsel was ineffective for failing to inform him that upon counsel's withdrawal, appellant could proceed ***pro se*** or hire new counsel. ***Friend*** did, indeed, add that requirement to the obligations of counsel attempting to withdraw from PCRA

representation. ***Friend***, 896 A.2d at 614-615. We note that while ***Friend*** was partially abrogated by the supreme court in ***Commonwealth v. Pitts***, 603 Pa. 1, 981 A.2d 875, 889 (2009), this aspect of ***Friend*** was not overturned. ***Commonwealth v. Rykard***, 55 A.3d 1177, 1184 (Pa.Super. 2012).

Appellant raised this matter in his supplemental Rule 907 response, and attached a copy of the letter that accompanied the copy of the ***Turner***-***Finley*** no-merit brief counsel sent to appellant. The letter does not inform appellant that he can proceed ***pro se*** or hire new counsel. Nonetheless, we see no prejudice to appellant. Because he raised the matter in his supplemental Rule 907 response, appellant was plainly aware that he could proceed ***pro se*** or hire counsel when there was still time to do so. Appellant first filed his supplemental Rule 907 response on July 28, 2011, and the court did not dismiss the petition until September 2, 2011. Thus, appellant had over a month to retain counsel if he so desired. We find no ineffectiveness on this basis.

Accordingly, having found no merit in the issues on appeal, we will affirm the order below.[3]

Order affirmed.

[3] To the extent that our rationale differs from that of the PCRA court, we note that we are not bound by that rationale, but may affirm on any basis. ***Commonwealth v. Doty***, 48 A.3d 451, 456 (Pa.Super. 2012).