NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
DARNELL P. LLOYD,	:	
	:	
Appellant	:	No. 2760 EDA 2012

Appeal from the PCRA Order September 5, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-1110191-2002

BEFORE: LAZARUS, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MAY 22, 2013**

Pro se Appellant, Darnell P. Lloyd, appeals from the order entered in the Philadelphia County Court of Common Pleas dismissing his first, timely Post Conviction Relief Act[1] ("PCRA") petition. He opines that trial counsel was ineffective by not filing a Pa.R.Crim.P. 600 motion, failing to have his trial severed from that of his co-defendant, and not challenging the discretionary aspects of his sentence. Appellant further suggests his PCRA counsel was ineffective for not investigating his claims. We affirm.

We state the facts as set forth by this Court on direct appeal:

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* Former Justice specially assigned to the Superior Court.

[1] 42 Pa.C.S. §§ 9541-9546.

> [A]t approximately 3:47 p.m. on May 7, 2002, as a result of [Appellant's] request to help him get revenge on a group of rivals, co-Defendant Raheem Revell ["Revell"] fatally shot Milton Young ["Young"] in the head and Erik Nicholas ["Nicholas"] in the chest, and shot and wounded Kevin Shaw. The shootings were committed in mid-afternoon at the busy intersection of Broad and Brown Streets in Philadelphia. [Appellant's] motive for conspiring to commit this crime with co-defendant Revell was retaliation for a fight that erupted at a basketball game whereby [Appellant] was injured.
>
> [Appellant] was tried together with co-defendant [Revell] and on March 2, 2004, their trial ended when [the trial court] was required to declare a mistrial due to a hopelessly deadlocked jury. A second trial began with jury selection on June 1, 2005. On June 24, 2005, the jury returned its verdict, and [Appellant] was found guilty of [two counts of third degree murder,[2] and one count each of attempted murder[3] and criminal conspiracy[4]]. On September 13, 2005, [the trial court] sentenced [Appellant] to two concurrent sixteen (16) to thirty-two (32) year terms of imprisonment on the Murder bills, and a concurrent sentence of eight (8) to sixteen (16) years imprisonment on the Attempted Murder bill. No further penalty was imposed for Criminal Conspiracy. [Appellant] was represented at trial by F. Michael Medway, Esquire.
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> Counsel filed an appeal on September 27, 2005. After a delay obtaining the relevant trial transcripts, counsel filed a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b) on October 11, 2005.[FN]
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> [FN]: Counsel filed a 1925(b) Statement reserving the right to review notes of testimony and raise "any other properly preserved appellate issue." [The trial court's] staff called counsel on numerous occasions to advise him

[2] 18 Pa.C.S. § 2502.

[3] 18 Pa.C.S. § 901.

[4] 18 Pa.C.S. § 903.

> that the notes of testimony were available, and to inquire whether or not counsel would file an amended 1925(b) statement. Counsel did not respond to [the trial court's] inquiries; therefore, since the notes of testimony were available for several months, and counsel was notified of this fact, and no amended 1925(b) statement was filed, [the trial court] finds any other possible issues that were preserved for appellate review are hereby waived.

Commonwealth v. Lloyd, No. 2781 EDA 2005 (unpublished memorandum at 1-2) (Pa. Super. May 8, 2007) (most alterations in original). On direct appeal, Appellant challenged the sufficiency of the evidence, and this Court affirmed. ***Id.*** He filed a petition for allowance of appeal with our Supreme Court, which denied the petition on August 18, 2009. Appellant filed a petition for a writ of *certiorari* with the United States Supreme Court, which denied same on April 19, 2010.

On March 18, 2011,[5] Appellant, *pro se*, filed a timely PCRA petition. In his petition, Appellant claimed trial counsel was ineffective for not filing a Pa.R.Crim.P. 600 motion and a motion to sever. Appellant's PCRA Pet., 3/18/11. He also alleged direct appeal counsel was ineffective for not obtaining the notes of testimony. Finally, Appellant alleged the court imposed a sentence greater than the statutory maximum.

[5] The Commonwealth incorrectly states that Appellant filed his petition on March 21, 2011. ***See Commonwealth v. Wilson***, 911 A.2d 942, 944 n.2 (Pa. Super. 2006) (discussing prisoner mailbox rule).

The PCRA court appointed counsel, who filed a ***Turner***/***Finley***[6] petition to withdraw on June 13, 2012. The PCRA court issued a Pa.R.Crim.P. 907 notice on August 1, 2012. Appellant did not respond to the Rule 907 notice.[7] On September 5, 2012, the PCRA court granted counsel's ***Turner***/***Finley*** petition and dismissed Appellant's PCRA petition. Appellant, *pro se*, timely appealed. The PCRA court did not order a Pa.R.A.P. 1925(b) statement.

On appeal, Appellant raises the following issues:

> Whether trial counsel was ineffective for failing to file a motion to dismiss the charges based upon a violation of Pa.R.Crim.P. 600.
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> Whether trial counsel was ineffective for failing to seek severance of trial with co-defendants.
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> Whether trial counsel was ineffective for acquiescing to the discretionary aspects of the sentence.
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> Whether [PCRA] counsel was ineffective whose [sic] "no-merit" letter failed to adequately and properly investigate the *pro se* claims.

Appellant's Brief at 3.

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[6] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

[7] The Commonwealth claims that Appellant mailed a response to the Rule 907 notice to the Commonwealth and the judge, but never filed it with the court. Commonwealth's Brief at 5 n.2. The certified record does not include any response. It is well-settled that an appellate court cannot consider anything outside the certified record. ***See Commonwealth v. Grant***, 813 A.2d 726, 734 (Pa. 2002).

We summarize Appellant's argument for his first issue. He contends that trial counsel was ineffective for not filing a Rule 600 motion for both of his trials. Appellant claims that the court would have granted either motion and dismissed his case with prejudice. We hold Appellant is not entitled to relief.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1267 (Pa. 2008).

> [C]ounsel is presumed to have provided effective representation unless the PCRA petitioner pleads and proves that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable basis for his or her conduct; and (3) Appellant was prejudiced by counsel's action or omission. To demonstrate prejudice, an appellant must prove that a reasonable probability of acquittal existed but for the action or omission of trial counsel. A claim of ineffective assistance of counsel will fail if the petitioner does not meet any of the three prongs. Further, a PCRA petitioner must exhibit a concerted effort to develop his ineffectiveness claim and may not rely on boilerplate allegations of ineffectiveness.

Commonwealth v. Perry, 959 A.2d 932, 936 (Pa. Super. 2008) (punctuation marks and citations omitted).

Instantly, Appellant has not identified any applicable authority or otherwise explained how the underlying claim has arguable merit. ***See id.***; ***see also*** Pa.R.A.P. 2119. Specifically, Appellant has not explained how or why certain time periods should not have been categorized as excludable

time. Absent that discussion and citation to relevant legal authority, we cannot opine on whether his claims had arguable merit. ***See Perry***, 959 A.2d at 936***.*** Thus, we are loathe to conclude that Appellant's bald assertions—that the time periods should not have been excludable—had arguable merit. ***See id.***

Appellant's second issue is that his trial counsel was ineffective for not seeking to sever his trial. Appellant concedes that his charges and that of his co-defendant arose from the same incident and thus the witnesses and evidence were essentially identical. He maintains, however, that his defense conflicted with the defense of his co-defendant. Appellant's Brief at 13. Thus, Appellant insists that trial counsel was ineffective for not filing a motion to sever and, consequently, he did not receive a fair trial. We decline to grant relief to Appellant.

Recently, our Supreme Court opined on the applicable standard of review:

> The decision to sever is within the discretion of the trial court, and we will reverse only if the trial court has abused that discretion. ***Commonwealth v. Collins***, 550 Pa. 46, 703 A.2d 418 (Pa. 1997). This Court has set forth a three-part test to guide the trial court in deciding a motion to sever:
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> > (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, (3) whether the

> defendant will be unduly prejudiced by the consolidation of offenses.

Id.

Commonwealth v. Jordan, No. 604 CAP, 2013 WL 1749826, at *7 n.2 (Pa. Apr. 24, 2013).

In this case, Appellant did not provide the requisite three-part analysis in the context of establishing his claim had arguable merit. ***Cf. id.***; ***Perry***, 959 A.2d at 936. Instead, as noted above, the gravamen of his argument was that the jury would be prejudiced against him due to conflicting defenses. ***See*** Appellant's Brief at 13. We would conclude that Appellant has not established the PCRA court abused its discretion. ***See Perry***, 959 A.2d at 936; ***see also*** Pa.R.A.P. 2119.

Appellant's next argument is that trial counsel was ineffective for failing to challenge discretionary aspects of his sentence. Appellant has waived that issue on appeal because he did not raise it in his PCRA petition. ***See Commonwealth v. Ousley***, 21 A.3d 1238, 1242 (Pa. Super. 2011) (holding, "issues not raised in a PCRA petition cannot be considered on appeal." (citation omitted)).

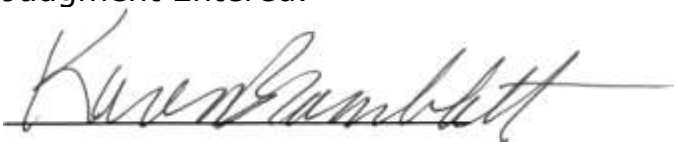
Appellant's last argument is that his PCRA counsel was ineffective for failing to investigate the claims raised in his *pro se* petition. Because Appellant failed to file a response to the court's Rule 907 notice,[8] he has

[8] ***See supra*** note 7.

waived such claims on appeal. ***See Commonwealth v. Pitts***, 981 A.2d 875, 879 n.3 (Pa. 2009). Accordingly, having discerned no legal error, we affirm the order dismissing Appellant's PCRA petition. ***See Abu-Jamal***, 941 A.2d at 1267.

Order affirmed.

Judgment Entered.



Prothonotary

Date: 5/22/2013