NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CHRISTOPHER A. SANTEE,	:	No. 280 MDA 2012
Appellant	:	

Appeal from the Order Entered December 30, 2011,
in the Court of Common Pleas of Luzerne County
Criminal Division at No. CP-40-CR-0001349-2008

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: February 21, 2013

Christopher A. Santee appeals from the order denying his PCRA[1] petition on the merits, following an evidentiary hearing. Appellant's present counsel has also filed a motion to withdraw from representation. We affirm, and grant counsel's motion to withdraw from representation pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988); ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (***en banc***).

A brief discussion of the facts and procedural history giving rise to the issues on appeal follows. This case involves the vicious assault of Daniel Austin ("Daniel"). Appellant's brother George passed away on October 7,

[1] Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546.

2007; his widow, Michele Santee ("Michele") was in possession of the urn containing his remains. Appellant and another one of his brothers, Jason Santee, believed that Michele was having a relationship with Daniel; appellant and Jason adamantly disapproved.

On December 18, 2007, appellant and Jason went to Michele's home and charged into the house. The men attacked Daniel, slamming him against a wall and throwing him on the floor. Appellant and Jason repeatedly kicked Daniel and stomped on his face. When Michele tried to stop the attack, appellant started to choke her and threatened to kill her. (Notes of testimony, 5/4/09 at 78.) At this point, Jason was still hitting Daniel. (***Id.***)

Sara Miller, who resided with Michele, was also present. Sara testified that appellant hit her over the head with a ceramic statue, grabbed her by the hair and began slamming her head into a wall so hard that her hair actually ripped out of her scalp. (***Id.*** at 79.) Photographs of the hair on the ground were shown to the jurors. Appellant and Jason left, taking the urn with them. (***Id.*** at 86.) Appellant was not arrested until three months after the incident as he could not be found. Appellant was charged with burglary, criminal trespass, receiving stolen property, theft by unlawful taking, simple assault, aggravated assault, and harassment.

On January 12, 2009, appellant entered a guilty plea to burglary and simple assault; the remaining charges were ***nol prossed.*** Prior to the

imposition of sentence, however, appellant withdrew his plea. On May 4, 2009, appellant proceeded to trial.

At trial, appellant and Jason both testified that they went to Michele's home on the night in question to help her maintain a furnace, as they frequently did. Jason explained that his anger toward Daniel had been brewing since his brother died and he believed that Michele was having a relationship with Daniel. He averred that he was the only person who hit Daniel and stated that appellant was in the garage when the altercation started. (***Id.*** at 206-207.) Appellant also testified that he was not a part of the fight. Appellant stated that he came into the room and Jason and Daniel were fighting. Appellant averred that Michele was on Jason's back and when he pulled her off, Sara hit him from behind, pulling his hair out of his ponytail. He claimed the hair on the ground in the photographs was his, not Sara's. (***Id.*** at 216-217.) Appellant testified that he was defending himself against Michele and Sara. Appellant denied kicking or hitting Daniel.

The following day, the jury found appellant guilty of aggravated assault, receiving stolen property and simple assault. Appellant was found not guilty of burglary and theft by unlawful taking. The trial court immediately imposed an aggregate sentence of 63 to 132 months' imprisonment. Appellant filed post-sentence motions seeking to modify his sentence. The motion was denied and appellant filed a timely notice of appeal. On September 8, 2010, a panel of this court affirmed judgment of

sentence. ***Commonwealth v. Santee***, 13 A.3d 974 (Pa.Super. 2010) (unpublished memorandum).

Thereafter, on June 13, 2011, appellant filed a ***pro se*** PCRA petition. Counsel was appointed; however, counsel filed a "no merit" letter and a motion to withdraw, pursuant to ***Turner***/***Finley***. The trial court denied counsel's motion and conducted a hearing on November 22, 2011. At that time, appellant was pursuing the following two issues: (1) trial counsel was ineffective in failing to object to a defense witness being forced to give testimony during trial while in shackles; and (2) trial counsel was ineffective when advising appellant that he should withdraw his guilty plea and proceed to trial on the theory of self-defense. At the hearing, appellant and trial counsel testified. Following the hearing, the PCRA court denied relief. (Docket #32.)

Appellant filed a timely notice of appeal. New counsel was appointed. The trial court ordered appellant to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. In response to the court's order, counsel filed a statement of intent to file a ***Turner***/***Finley*** brief, in lieu of a Rule 1925(b) statement,

declaring his intent to withdraw. ***See*** Pa.R.A.P. 1925(c)(4)[2]. Counsel complied, indicating that it would be filing a no merit letter, and the PCRA court has filed an opinion.

Prior to reviewing the merits of this appeal, we first decide whether counsel has fulfilled the procedural requirements for withdrawal. ***Commonwealth v. Daniels***, 947 A.2d 795, 797 (Pa.Super. 2008). As we have explained:

> Counsel petitioning to withdraw from PCRA representation must proceed . . . under [***Turner***, ***supra*** and ***Finley***, ***supra*** and] . . . must review the case zealously. ***Turner/Finley*** counsel must then submit a "no-merit" letter to the trial court, or brief on appeal to this Court, detailing the nature and extent of counsel's diligent review of the case, listing the issues which petitioner wants to have reviewed, explaining why and how those issues lack merit, and requesting permission to withdraw.
>
> Counsel must also send to the petitioner: (1) a copy of the "no merit" letter/brief; (2) a copy of counsel's petition to withdraw; and (3) a statement advising petitioner of the right to proceed ***pro se*** or by new counsel.

[2] Pa.R.A.P. 1925(c)(4) states: "In a criminal case, counsel may file of record and serve on the judge a statement of intent to file an ***Anders***/***McClendon*** brief in lieu of filing a Statement. If, upon review of the ***Anders***/***McClendon*** brief, the appellate court believes that there are arguably meritorious issues for review, those issues will not be waived; instead, the appellate court may remand for the filing of a Statement, a supplemental opinion pursuant to Rule 1925(a), or both. Upon remand, the trial court may, but is not required to, replace appellant's counsel." It does not specifically refer to the filing of a ***Turner***/***Finley*** brief during a PCRA proceeding. Rule 1925 makes no analogous provision for an attorney in a PCRA appeal who intends to file a ***Turner***/***Finley*** petition. We decline to find waiver for counsel's filing a statement of intent to file a ***Turner***/***Finley*** petition.

> * * *
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> [W]here counsel submits a petition and no-merit letter that . . . satisfy the technical demands of ***Turner***/***Finley***, the court—trial court or this Court—must then conduct its own review of the merits of the case. If the court agrees with counsel that the claims are without merit, the court will permit counsel to withdraw and deny relief.

Commonwealth v. Wrecks, 931 A.2d 717, 721 (Pa.Super. 2007) (internal citations omitted).

Here, counsel has satisfied all of the above procedural requirements. Having concluded that counsel's petition to withdraw is ***Turner***/***Finley*** compliant, we now undertake our own review of the case to consider whether the PCRA court erred in dismissing appellant's petition. We further note that appellant has not retained new counsel nor filed a ***pro se*** brief.

The two issues presented for review in the ***Turner***/***Finley*** brief are as follows:

> (1) Whether trial counsel rendered ineffective assistance of counsel in failing to object to a defense witness being forced to give testimony during trial while in shackles and handcuff's?;
>
> (2) Whether trial counsel rendered ineffective assistance of counsel in advising [appellant] that he should withdraw his guilty plea and proceed to trial because he had a good case of self-defense?

(Appellant's brief at 5.) Essentially, appellant avers that the PCRA court erred in denying his petition for relief.

We note that in reviewing the propriety of an order granting or denying PCRA relief, this court is limited to determining whether the evidence of record supports the determination of the PCRA court, and whether the ruling is free of legal error. ***Commonwealth v. Liebel***, 573 Pa. 375, 379, 825 A.2d 630, 632 (2003). Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. ***Commonwealth v. McClellan***, 887 A.2d 291, 298 (Pa.Super. 2005), ***appeal denied***, 587 Pa. 687, 897 A.2d 453 (2006).

Moreover, since 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. Kimball***, 555 Pa. 299, 724 A.2d 326 (1999). The failure to satisfy any prong of this test will cause the entire claim to fail. ***Daniels***, ***supra***. Finally, counsel is presumed to be effective, and appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699 (Pa.Super. 2004).

Turning to the first claim, appellant essentially avers that the PCRA court erred in finding no merit to his claim that his trial counsel provided ineffective assistance as he failed to object when Jason testified while in shackles. Appellant argued the shackles would have immediately affected how the jurors perceived Jason's credibility. No relief is due.

At the PCRA hearing, trial counsel testified that he could not recall if Jason had testified while in shackles. (Notes of testimony, 11/22/11 at 15, 23.) Appellant did not point to any portion of the record to indicate that Jason was wearing shackles. In any event, even if Jason were not in shackles at trial, the jury was aware Jason was currently incarcerated pursuant to his guilty plea directly related to his role in the December 18, 2007 incident. For instance, several times during trial Jason testified that he had remorse for being involved in the crimes, he referred to the fact that he was in prison, and mentioned his guilty plea. (***Id.*** at 202, 211.) Appellant has not demonstrated that had Jason testified unshackled, the jury would have perceived his credibility differently, resulting in a different outcome of the trial. As the PCRA court states in its Rule 1925(a) opinion, no credible evidence was presented to support appellant's claim. (PCRA court opinion, 8/17/12 at 4.)

Next, appellant argues that trial counsel was ineffective in relation to his decision to withdraw his guilty plea prior to sentencing and proceed to trial. At the PCRA hearing, appellant testified that counsel advised him that

he had a valid self-defense claim and should proceed to trial. Appellant avers that he chose to withdraw his plea based on this advice. No relief is due.

As the PCRA court states in its Rule 1925(a) opinion, appellant's "dissatisfaction with the ultimate result of his conviction and sentencing do not support a claim of ineffective assistance of counsel." (***Id.*** at 3.) In fact, appellant's own testimony refutes this claim. At the PCRA hearing, appellant testified and agreed that the decision to withdraw his guilty plea was ultimately his and he admitted that he was not forced to withdraw his plea. (Notes of testimony, 11/22/11 at 17.) "I'm not saying that he convinced me, but I took his advice. I pulled my plea." (***Id.*** at 12-13.) The following occurred on cross- examination:

> [The prosecutor]: You said that it was your decision to withdraw the guilty plea ultimately?
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> [Appellant]: **Yes, it was.**
>
> [The prosecutor]: So you weren't forced to withdraw your guilty plea, were you?
>
> [Appellant]: **No, I wasn't.**
>
> [The prosecutor]: I don't have anything further.
>
> The Court: Your testimony was that he told you that you would have a good chance if you went to trial to beat it with a self-defense claim?
>
> [Appellant]: His answer was when I asked him what do you think will come of it, he says, I don't think you're looking at much more time if you were to plead guilty or go to trial.

Id. at 17-18. (Emphasis added).

Further, trial counsel testified that he did not advise appellant one way or the other about withdrawing his plea. In fact, counsel testified that appellant was "insistent" that he was going to go to trial. (***Id.*** at 21.) When appellant asked counsel if he had made a bad decision in withdrawing his plea, counsel told appellant:

> "I don't think it's a crazy decision. I don't know if it is a good decision or a bad decision, but it is not a crazy decision. I also told him I like to [sic] going to trial, but that doesn't necessarily mean it's the best thing for him. I did not influence him one way or the other to go to trial or not to go to trial."

Id. Counsel also recollected that appellant had another opportunity to re-enter his plea and he chose not to do so. (***Id.*** at 17-18.) Additionally, the record reflects that before trial commenced, appellant averred to the trial court that he wished to proceed to trial. The trial court informed appellant that if he still wished to plead guilty, another judge would accept his plea. Appellant was provided with an opportunity to speak with his attorney and had no further response before trial commenced.

The PCRA court obviously chose to credit the testimony of trial counsel. (PCRA court opinion, 8/17/12 at 4.) The fact that appellant is disappointed in the outcome of trial and the sentence imposed do not vitiate the withdrawal of his guilty plea as appellant did not demonstrate that trial

counsel caused him to involuntarily withdraw his plea and proceed to sentencing.

Order affirmed. Motion to withdraw granted.