

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOEL AGRON,	:	
	:	
Appellant	:	No. 2831 EDA 2011

Appeal from the PCRA Order September 9, 2011,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0113271-2002

BEFORE: GANTMAN, DONOHUE and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: January 9, 2013

Joel Agron ("Agron") appeals from the September 9, 2011 order of the Court of Common Pleas, Philadelphia County, denying his petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Upon review, we affirm.

We previously summarized the factual and procedural histories of the case as follows:

On June 4, 2003, a jury convicted Agron of aggravated assault, attempted murder, violation of the Uniform Firearms Act, and possessing an instrument of crime. On August 21, 2003, the trial court sentenced Agron to an aggregate term of imprisonment of 12½ years to 25 years. Agron appealed to this Court which, on December 16, 2004, affirmed the judgment of sentence. ***Commonwealth v. Agron***, 869 A.2d 2 (Pa. Super. 2004) (unpublished memorandum). On May 17, 2005, our Supreme Court denied Agron's petition for

*Retired Senior Judge assigned to the Superior Court.

allowance of appeal. *Commonwealth v. Agron*, 583 Pa. 667, 876 A.2d 392 (2005).

On August 12, 2005, Agron filed a *pro se* PCRA petition alleging trial and appellate counsel were ineffective. The PCRA court appointed Derrick W. Coker, Esq. ([']Coker[']) to represent Agron in the PCRA proceedings. Apparently, Agron sent Coker two letters which Coker received, respectively, on 12/05/05 and 1/17/06. Coker, after reviewing the file and interviewing Agron, concluded the issues Agron raised in his petition were meritless. Accordingly, counsel sent Agron a 'no-merit' letter dated January 26, 2006 pursuant to *Turner/Finley* [].

* * *

On July 24, 2006, the PCRA court (The Honorable John J. Chiovero) filed a Notice of its Intention to Dismiss the Petition based on the reasons set forth in Coker's no-merit letter.

In a letter to Agron dated August 17, 2006, Coker acknowledged receipt of a notarized statement from Jose Hernandez ([']Hernandez[']). According to Hernandez, Mr. Crusito Cruz and Agron were struggling for control of a gun and during the struggle the gun fired and the victim started screaming. Coker, after reviewing the statement, concluded the statement 'gives no cause for me to do anything other than reassert my 1/26/06 Finley letter. The [s]tatement . . . seems to take this out of the scope provisions of the Pennsylvania P.C.R.A., 42 Pa.C.S. Section 9542.' Coker's letter to Agron dated 8/17/06.

On September 15, 2006, the PCRA court dismissed the petition. The PCRA court, however, did not advise Agron of the dismissal of his petition. **See** Pa.R.Crim.P. 907(4).

About one year later (July 16, 2007), Coker filed an 'Amended Finley' letter [] arguing, once again, the

PCRA petition was wholly frivolous and meritless. On July 31, 2007, Agron filed his 'Objections to P.C.R.A. Counsel's Finley Letter Dated July 16, 2007.'

On October 31, 2007, the PCRA court filed another Notice of its Intention to Dismiss the petition stating the issues raised in the PCRA petition were without merit. On November 29, 2007, the PCRA court dismissed the petition. The PCRA court, however, once again, did not advise Agron of the dismissal.

In the meantime, Judge Chiovero retired from the bench. After being contacted by Agron, The Honorable Pamela Pryor Dembe, in an attempt to correct recurring administrative glitches, entered an order formally dismissing Agron's petition on September 22, 2008. On October 10, 2008, Agron appealed to this Court.

Commonwealth v. Agron, 2944 EDA 2008 (unpublished memorandum), 1-4 (Pa. Super. September 2, 2009) (footnote omitted).

On appeal, this Court determined that Coker failed to comply with the requirements of ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). We therefore vacated the PCRA court's order dismissing Agron's petition and remanded for further proceedings.

On remand, the case was assigned to the Honorable Susan I. Schulman. The PCRA court appointed new counsel, Norman O. Scott, Esquire ("Scott"), who filed an amended PCRA petition and supporting memorandum on Agron's behalf on November 19, 2010. Therein, Scott raised issues of ineffective assistance of trial counsel for failing to call

Hernandez to testify at trial and for failing to cross-examine a Commonwealth witness, Vanessa Rodriguez ("Rodriguez"), establishing her bias against Agron, who was her ex-boyfriend. On May 15, 2011, the Commonwealth filed a motion to dismiss the PCRA petition. The PCRA court issued a notice of its intention to dismiss the petition on July 20, 2011 pursuant to Pa.R.Crim.P. 907(1),¹ and ultimately did so in an order filed on September 12, 2011.

On October 11, 2011, Scott filed a timely notice of appeal on Agron's behalf, along with a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b), raising the issue of trial counsel's ineffectiveness for failing to cross-examine Rodriguez regarding her bias against Agron. The trial court issued a written opinion on March 20, 2012, explaining its decision was based upon its review of the record that trial counsel did in fact cross-examine Rodriguez in an attempt to establish her bias against Agron.

¹ Rule 907(1) states: "[T]he judge shall promptly review the petition, any answer by the attorney for the Commonwealth, and other matters of record relating to the defendant's claim(s). If the judge is satisfied from this review that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings, the judge shall give notice to the parties of the intention to dismiss the petition and shall state in the notice the reasons for the dismissal. The defendant may respond to the proposed dismissal within 20 days of the date of the notice. The judge thereafter shall order the petition dismissed, grant leave to file an amended petition, or direct that the proceedings continue." Pa.R.Crim.P. 907(1).

On appeal, Agron raises one issue for our review: “Did the PCRA court err in dismissing [Agron’s] [a]mended [p]etition alleging a denial of effective assistance of counsel[,] when taken together with the Commonwealth’s [m]otion to [d]ismiss[,] raised a material issue of fact regarding the truth determining process?” Agron’s Brief at 4.

Initially, we note that the argument raised on appeal is different from the argument he raised in his 1925(b) statement. In his brief, Agron claims that the PCRA court erred by dismissing his amended PCRA petition without a hearing, but in his 1925(b) statement, he asserts he “was denied effective assistance of counsel in that trial counsel failed to cross[-]examine the chief witness for the Commonwealth regarding bias creating a situation in which no reliable adjudication of guilt or innocence could be had.” **Compare**, Agron’s Brief at 9 **with** 1925(b) Statement, 10/11/11. The argument section of Agron’s brief, which consists of a single page and does not include the name of the witness that trial counsel allegedly failed to adequately cross-examine or any law regarding a finding of ineffective assistance of counsel, does not permit us to reconcile the differences between the issue raised as opposed to the issue argued on appeal. Thus, neither issue is preserved for our review. Pa.R.A.P. 1925(b)(4)(vii) (stating that issues not raised in an appellant’s 1925(b) statement are waived); **Commonwealth v. Deek**, 954 A.2d 603, 610 (Pa. Super. 2008) (indicating that there must be strict compliance with Pa.R.A.P. 1925(b)).

Even if not waived, however, neither issue warrants relief.² Our review of the record reveals, as stated by the PCRA court, that trial counsel did cross-examine Rodriguez in an attempt to establish that she was biased against Agron. **See** N.T., 6/3/03, at 156-59; PCRA Court Opinion, 3/20/12, at 4. As the issue is meritless, trial counsel cannot be found to have been ineffective on that basis,³ and the PCRA court did not err by dismissing the amended PCRA petition without a hearing. **See** Pa.R.Crim.P. 907(1).

Order affirmed.

² When “reviewing the propriety of an order 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. Boyd**, 923 A.2d 513, 515 (Pa. Super. 2007). “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.” **Id.**

³ In reviewing an allegation of ineffective assistance of counsel, we begin with the assumption that counsel was effective. **Commonwealth v. Pierce**, 515 Pa. 153, 159, 527 A.2d 973, 975 (1987). In order to overcome this presumption, a claimant must establish three prongs or elements: (1) that the underlying claim is of arguable merit; (2) that counsel’s action or inaction was not based on a reasonable trial strategy; and (3) that counsel’s action or inaction prejudiced the claimant. **Id.** at 158-59, 527 A.2d at 975. If the claimant fails to establish any one of these three prongs, his challenge must fail. **Commonwealth v. O’Bidos**, 849 A.2d 243, 249 (Pa. Super. 2004).