

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

SARAH ANN SHUTTY

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 303 WDA 2012

Appeal from the Order Entered January 30, 2012
In the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0001953-2010

BEFORE: PANELLA, J., ALLEN, J., and STRASSBURGER, J.*

MEMORANDUM BY PANELLA, J.

Filed: February 26, 2013

The Commonwealth of Pennsylvania appeals from the order entered January 30, 2012, in the Court of Common Pleas of Cambria County, which granted, in part, Appellee, Sarah Ann Shutty's post-sentence motions. The order additionally granted Shutty's request for a new trial, based upon trial counsel's alleged ineffective assistance. After review, we reverse the trial court's order and reinstate Shutty's judgment of sentence.

On May 20, 2011, a jury convicted Shutty of two counts of possession of a controlled substance and two counts of delivery of a controlled substance, namely, heroin and a heroin/morphine mix. The charges arose out of an incident in which Shutty was videotaped handing the drugs to an

* Retired Senior Judge assigned to the Superior Court.

undercover police officer. Immediately following trial, defense counsel filed a Motion for Judgment of Acquittal and in Arrest of Judgment objecting to the Commonwealth's alleged introduction of Shutty's prior criminal history on cross-examination in violation of 42 PA.CON.S.TAT.ANN. § 5918. The trial court ultimately denied Shutty's motion and on August 25, 2011, sentenced her to an aggregate term of 24 to 48 months' incarceration.

After retaining new counsel, Shutty filed post-sentence motions on August 31, 2011, raising several allegations of trial counsel's ineffectiveness. Following an evidentiary hearing on January 19, 2012,¹ the trial court granted Shutty's post-sentence motions in part, determined that trial counsel was ineffective for failing to object to the Commonwealth's cross-examination regarding Shutty's *crimen falsi* and ordered a new trial. The Commonwealth thereafter filed this timely appeal.²

¹ Immediately prior to the evidentiary hearing conducted on Shutty's post-sentence claims of ineffective assistance of counsel, Shutty acknowledged in open court that she waived her rights to review these claims under the Post Conviction Relief Act. **See** N.T., Evidentiary Hearing, 1/19/12 at 3. **See also, Commonwealth v. Barnett**, 25 A.3d 371, 377 (Pa. Super. 2011) (*en banc*) (Noting that we "cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an 'express, knowing and voluntary waiver of PCRA review.'" (citing **Commonwealth v. Liston**, 602 Pa. 10, 22, 977 A.2d 1089, 1096 (2009) (Castille, C.J., concurring)). Accordingly, there is no impediment to our review of these claims on direct appeal.

² This appeal properly invokes the jurisdiction of this Court as an interlocutory appeal from "an order in a criminal proceeding awarding a new trial ... where the Commonwealth claims that the lower court committed an error of law." **See** Pa.R.A.P. 311(a)(6).

To determine whether the trial court erred in granting a new trial based on claims of ineffectiveness of trial counsel, we turn to the following principles of law:

In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place ... Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) 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. Johnson, 868 A.2d 1278, 1281 (Pa. Super. 2005).

Moreover, “[w]e presume counsel is effective and place upon Appellant the burden of proving otherwise.” ***Commonwealth v. Springer***, 961 A.2d 1262, 1267-1268 (Pa. Super. 2008). “This Court will grant relief only if Appellant satisfies each of the three prongs necessary to prove counsel ineffective.” ***Commonwealth v. Natividad***, 595 Pa. 188, 208, 938 A.2d 310, 322 (2007). Thus, we may deny an ineffectiveness claim if “the evidence fails to meet a single one of these prongs.” ***Id.***, 595 Pa. at 207-208, 938 A.2d at 321.

Instantly, the trial court found that defense counsel was ineffective in permitting evidence of Shutty’s prior criminal history. Specifically, the trial court determined that defense counsel’s failure to object to the Commonwealth’s questioning on cross-examination regarding Shutty’s prior

convictions in 2006 for theft by deception, theft by unlawful taking, and forgery,³ violated 42 PA.CON.S.TAT.ANN. § 5918, **Examination of defendant as to other offenses**. Section 5918 provides that:

No person charged with any crime and called as a witness in his own behalf, shall be asked, or if asked, shall be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation unless:

(1) he shall have at such trial, personally or by counsel, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation; or

(2) he shall have testified at such trial against a codefendant, charged with the same offense.

42 PA.CON.S.TAT.ANN. § 5918.

The Commonwealth contends that Shutty opened the door to the rebuttal evidence regarding her prior criminal history when Shutty's mother, Kathy Moore, testified to her good character. Specifically, Moore testified that:

Since Sarah has been away from Jimmy she has been clean, she has held a job, she has taken care of herself. She is now taking care of four boys full time and her other two children on weekends. That means six children in the house. When I walk into her house it's cleaner than mine half the time, most of the time. I am very proud of where she's come. She has advanced so much, and she helps me at home.

N.T., Jury Trial, 5/20/11 at 74.

³ See N.T., Jury Trial, 5/20/11 at 127.

The Commonwealth argues that Moore's testimony is analogous to the testimony presented at a penalty phase hearing in ***Commonwealth v. Travaglia***, 28 A.3d 868 (Pa. 2011), wherein Appellant introduced testimony regarding his discipline record and work history while Appellant was in prison. "Appellant additionally presented good character testimony including that, as a student, he was well-behaved, respectful, disciplined, and well-liked; that Appellant had become addicted to drugs prior to the occurrence of the crimes; and that, since his imprisonment, Appellant has found religion and become a 'new man.'" ***Id.***, 28 A.3d at 879. The Supreme Court held that under section 5918(1) the Commonwealth "was entitled to rebut Appellant's portfolio of character evidence with evidence of behavior that occurred prior to Appellant's incarceration." ***Id.***

Although Shutty argues that ***Travaglia*** is inapposite as the rebuttal testimony occurred during a penalty phase hearing, we find the procedural posture of the case to be irrelevant and find ***Travaglia*** to be analogous to the circumstances presented in the case *sub judice*. As in ***Travaglia***, Shutty presented good character testimony that she was drug-free, an able mother to her children and employed. "Once a defendant has presented evidence to prove his good character or reputation, or has himself introduced evidence of his prior crimes, the prosecution has a limited right to introduce evidence of prior convictions in rebuttal." ***Commonwealth v. Palmer***, 462 A.2d 755, 760 (Pa. Super. 1983). Because the Commonwealth's cross-examination rebutted this good character testimony with Shutty's prior *crimen falsi*

convictions as permitted under section 5918, any objection would have lacked arguable merit. Thus, counsel was not ineffective for failing to object.

As we find counsel was not ineffective in permitting evidence of Shutty's prior criminal history, we find no basis on which to grant Shutty a new trial. Therefore, we are constrained to reverse the trial court's order granting Shutty a new trial, and reinstate Shutty's judgment of sentence.

Order reversed. Judgment of sentence reinstated. Jurisdiction relinquished.