NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYVANIA Appellee v. RICHARD ULRICH Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 337 WDA 2012

Appeal from the PCRA Order of February 17, 2012
In the Court of Common Pleas of Blair County
Criminal Division at No(s): CP-07-CR-0002523-2007

BEFORE: GANTMAN, J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY WECHT, J. Filed: March 1, 2013

Richard Ulrich ["Appellant"] appeals the February 17, 2012 order denying his Post-Conviction Relief Act ["PCRA"][1] petition. Following a jury trial, Appellant was convicted of two counts each of aggravated assault,[2] simple assault,[3] recklessly endangering another person,[4] disorderly conduct,[5]

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* Former Justice specially assigned to the Superior Court.

1 42 Pa.C.S.A. §§ 9541-46.

2 18 Pa.C.S.A. § 2702(a)(1).

3 18 Pa.C.S.A. § 2701(a).

4 18 Pa.C.S.A. § 2705.

5 18 Pa.C.S.A. § 5503(a)(1).

making or selling an offensive weapon,[6] and one count of possessing an instrument of crime.[7] Upon review, we affirm.

On May 8, 2008, Appellant was sentenced to twelve to twenty-four years of incarceration. Appellant filed a direct appeal to our Court. On May 6, 2009, we issued a memorandum affirming his convictions. In so doing, we set forth the factual history of this case as follows:

> [T]his incident occurred on the evening of October 13, 2007, and extended into the early morning hours of October 14, 2007. On the evening in question, [Appellant], Joseph Stewart, and Brian Stewart were first at Rubine's in Altoona where Joseph Stewart and [Appellant] initially got together. At Rubine's, there was discussion of an earlier incident in May of 2007, in which [Appellant] had been beaten up by Joseph Stewart, Brian Stewart and his own brother Eric. The discussion at Rubine's was basically that [Appellant] wanted to fight Brian Stewart. Joseph Stewart thought this was okay as long as it was a one-on-one fight.
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> Later that evening, the same parties got together again at the Island Bar [] on Mill Run Road. According to the Stewarts, [Appellant] was annoying Brian Stewart and Brian punched him. This resulted in Brian Stewart being evicted from the bar. Joseph Stewart followed [Brian Stewart] into the parking lot (although Joseph was not evicted). According to the Stewarts, this was a one punch fight.
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> The Stewarts [] then returned to their residence. [Appellant] followed them there with his cousin Dennis Leonard after a stop at Sheetz Convenience Store which was captured on videotape. The videotape showed no evidence of any physical injury to [Appellant]. The fight which occasioned these criminal charges occurred shortly thereafter outside the home of Brian Stewart.

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[6] 18 Pa.C.S.A. § 908(a).

[7] 18 Pa.C.S.A. § 907(a).

> According to the testimony, [Appellant] arrived at [Brian Stewart's house] indicating that he wanted to fight again. There was a scuffle in the street with [Appellant] getting the worst of it. At this point, [Appellant] stopped fighting [, stated that he has had enough, and hugged Joseph Stewart and tried to hug Brian Stewart.] [Appellant] then went to his car and returned (unbeknownst to Brian Stewart) with a cigar lighter that had a switch blade knife attached. The lighter/knife was entered into evidence at trial. It possessed approximately a [one-half to one] inch blade. [Appellant] then asked to resume the fight and Brian agreed. [Appellant] threw a roundhouse punch at Brian's head which Brian blocked with his arm and hand resulting in a cut that require[d] eleven (11) stitches. [Appellant] next took a swipe at Joseph (even though Joseph had not been a participant in the fight) and caught him in the neck causing injuries that ultimately required exploratory surgery at the Altoona Hospital. It turned out that the cut to Joseph Stewart narrowly missed his jugular as testified to by Dr. Newlin. Dr. Newlin opined that the jugular was missed by the width of about three (3) dimes.
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> In response, [Appellant] did not testify or present any witnesses. He did, however, get his statement to Detective Benjamin Jones read into evidence in its entirety. In his statement, [Appellant] claimed that his mindset was that he had been beaten up back in May and that [the Stewarts] were aggressive towards him. There [were] no witnesses who confirm[ed] this and, in fact, all of the witnesses claim that [Appellant] was the aggressor.

Commonwealth v. Ulrich, 976 A.2d 1217 (Pa. Super. 2009) (unpublished memorandum) at 1-3 (alterations in original) (citing Trial Court Opinion ["T.C.O."], 7/10/08, at 3-5.).

On May 5, 2010, Appellant filed a *pro se* PCRA petition. On October 13, 2010, Appellant filed an amended PCRA petition through counsel. The PCRA court held hearings on July 5, 2011 and August 25, 2011. On February 17, 2012, the PCRA court issued an opinion and order dismissing Appellant's petition. This timely appeal followed. Appellant was not ordered

to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

Appellant raises the following issues for our review:

> 1. Whether the Trial Court erred in finding that the Appellant's prior counsel was not ineffective in failing to "attack" (through cross examination) Officers Benjamin Jones and David Jones on the issues of (1) whether the photograph the Officer took of the Appellant was altered; (2) the claim the Appellant was never mirandized at the time he made his statement to the police; and (3) the claim the Appellant's signature was forged on the Miranda waiver form represented a valid defense trial strategy.
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> 2. Whether the Trial Court erred in finding that the Appellant's prior counsel was not ineffective by placing the Appellant in a negative light by referring to him as "street people" in his opening argument.
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> 3. Whether the Trial Court erred in finding that the Appellant's prior counsel was not ineffective in how he cross-examined Dr. Matthew Newlin.
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> 4. Whether the Trial Court erred in finding that the Appellant's prior counsel was not ineffective in failing to strike Juror # 8 during the jury selection.
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> 5. Whether the Trial Court erred in finding that the Appellant's prior counsel was not ineffective in failing to call Danny Leonard or Billy Mountain as witnesses.
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> 6. Whether the Trial Court erred in finding that the Appellant's prior counsel was not ineffective in failing to apply the Best Evidence Rule regarding the Appellant's interview.

Appellant's Brief at 3.

When reviewing a denial of PCRA relief, this Court must determine whether the PCRA court's decision was supported by the record and is free of legal error. ***Commonwealth v. Miller***, 987 A.2d 638, 648 (Pa. 2009)

(citing ***Commonwealth v. Fahy***, 959 A.2d 312, 316 (Pa. 2008)). "[T]his Court's scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party, in this case, the Commonwealth." ***Fahy***, 959 A.2d at 316. The level of deference that we will grant to the PCRA court varies based upon whether the issue is one of determining credibility or applying governing law to a factual scenario. ***Id.*** (quoting ***Commonwealth v. Reaves***, 923 A.2d 1119, 1124 (Pa. 2007)). As our Supreme Court has stated:

> "The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to our plenary review." ***Commonwealth v. Hawkins***, 894 A.2d 716, 722 (Pa. 2006); ***see also Commonwealth v. (Damon) Jones***, 912 A.2d 268, 293 (Pa. 2006) ("The findings of a post-conviction court, which hears evidence and passes on the credibility of witnesses, should be given great deference."); ***Commonwealth v. White***, 734 A.2d 374, 381 (Pa. 1999) (appellate court is bound by credibility determinations of PCRA court where determinations are supported by record).

Commonwealth v. Johnson, 966 A.2d 523, 532 (Pa. 2009).

All of Appellant's issues allege that his trial counsel was ineffective. "Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner." ***Id.*** (citing ***Commonwealth v. Dennis***, 950 A.2d 945, 954 (Pa. 2008)). To overcome this presumption and to sustain a PCRA claim of ineffective assistance of counsel, Appellant must satisfy the following three requirements:

> (1) the underlying claim is of arguable merit; (2) counsel's performance lacked a reasonable basis; and (3) the ineffectiveness of counsel caused the petitioner prejudice. A chosen strategy will not be found to have been unreasonable unless it is proven that the path not chosen offered a potential for success substantially greater than the course actually pursued. Finally, to prove prejudice, a defendant must show that but for counsel's error, there is a reasonable probability, *i.e.,* a probability that undermines confidence in the result, that the outcome of the proceeding would have been different. A defendant's failure to satisfy even one of the three requirements results in the denial of relief.

Miller, 987 A.2d at 648-49 (internal quotation marks and citations omitted).

First, Appellant claims that his trial counsel was ineffective for failing to question Officer Benjamin Jones and Officer David Jones regarding the photograph taken of Appellant on the night of his arrest and their failure to read Appellant his ***Miranda***[8] rights. Appellant claims that his signature on the ***Miranda*** waiver form was forged. Appellant's arguments that he was never read his ***Miranda*** rights and that his photograph was doctored span two paragraphs and fail to satisfy any of the three requirements necessary to succeed on an ineffective assistance of counsel claim. Appellant's Brief at 9; ***Miller***, 987 A.2d at 648. Appellant claims only that trial counsel had an affirmative duty to challenge the actions of arresting officers and to raise these claims of prosecutorial misconduct. Appellant's Brief at 9. Appellant's conclusory statements neither overcome the presumption that trial counsel

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[8] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

was effective nor satisfy any of the three factors required to sustain an ineffective assistance of counsel claim.

Appellant next claims that his trial counsel was ineffective for placing Appellant "in a negative light by referring to him as 'street people' in his opening argument." Appellant's Brief at 3. Appellant claims that trial counsel's strategy to refer to him as a "street" person lacked a reasonable basis. However, Appellant acknowledges that we previously have found that reference to a defendant in a less than favorable light can be allowed as part of a reasonable trial strategy. In ***Commonwealth v. Wienckowski***, 537 A.2d 866, 869 (Pa. Super. 1988), we affirmed the trial court's denial of an ineffective assistance of counsel claim where counsel there referred to the defendant's lifestyle as "seamy" in his closing argument. We found that defense counsel's strategy to establish "common ground with jury" and demonstrate that "it was possible to both be shocked by the defendant's professed lifestyle and yet still reach a verdict of not guilty" had a reasonable basis. ***Id.*** In the case before us, trial counsel referred to both Appellant and the victims as "street people" in an effort to explain why Appellant chose to act in self-defense rather than backing off. Notes of Testimony ["N.T."], 3/11/08, at 33-35. We are unable to conclude that trial counsel's reference could not have formed part of a reasonable trial strategy. Moreover, Appellant has failed to argue that, but for trial counsel's reference, there was a reasonable probability that the outcome of the

proceeding would have been different. ***Miller***, 987 A.2d at 648-49. Accordingly, Appellant is not entitled to relief.

In his third issue, Appellant alleges that trial counsel was ineffective for failing to attack the credibility of Matthew Newlin, M.D. ["Dr. Newlin"], in light of the inconsistencies contained within Dr. Newlin's medical report and testimony. Appellant claims that, in his medical report, Dr. Newlin referred to a wound suffered by one of the victims as a laceration, but that during his testimony he referred to that injury as a puncture wound. Appellant claims that a puncture wound is a more serious injury.

During his testimony, Dr. Newlin actually referred to the victim's wound as both a laceration and a puncture wound. N.T., 3/11/08, at 205-07. Dr. Newlin believed that the victim's injury could be classified as both. ***Id.*** While Dr. Newlin may not have referred to the wound as a puncture wound in his medical report, Appellant does not explain how questioning Dr. Newlin about this change in classification would or could have changed the outcome of the proceeding. Accordingly, Appellant has not demonstrated that he was prejudiced by this alleged error. ***See Miller***, 987 A.2d at 648. This issue fails.

Next, Appellant alleges that trial counsel was ineffective for failing to move to strike juror number eight, who did not realize until after trial started that he attended high school with one of the victims. Appellant argues that, because of this attenuated relationship between a victim and a juror, Appellant was denied an impartial jury. However, juror number eight

explicitly stated that the fact that he attended high school with a victim "isn't gonna change my decision one way or the other." N.T., 3/12/08, at 84. Juror number eight further stated that, while he knew the victim in high school, he did not form any impressions of him that would impact his ability to act as a fair and impartial juror. ***Id.*** at 86.

Appellant fails to explain how juror number eight tainted the jury notwithstanding that juror's testimony that he would be impartial. Appellant's trial counsel testified that he did not believe there was any legal basis warranting removal of juror number eight. N.T., 7/5/11, at 27. Rather, trial counsel believed that juror number eight might have had a negative opinion of the victims, who had a reputation for drinking and fighting, thereby aiding the defense plan to show that Appellant acted in self-defense. ***Id.*** at 28. Trial counsel's decision to retain juror number eight was supported by a reasonable thought process. Moreover, Appellant has failed to show how he was prejudiced by juror number eight's retention. ***See Miller***, 987 A.2d at 648. No relief is due.

Appellant next claims that trial counsel was ineffective for failing to call Danny Leonard ["Mr. Leonard"] and Billy Mountain ["Mr. Mountain"] as witnesses. Mr. Leonard was with Appellant on the night that Appellant attacked the victims. Mr. Mountain was a bouncer at the bar where the fight originally broke out. Appellant claims that both witnesses would have confirmed Appellant's testimony that one of the victims initiated the fight.

Appellant's Brief at 16. To prove that failure to call a witness constitutes ineffective assistance of counsel, a petitioner must show that:

> (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Johnson, 966 A.2d 523, 536 (Pa. 2009) (quoting ***Commonwealth v. Washington***, 927 A.2d 586, 599 (Pa. 2007)).

Trial counsel testified that he made multiple attempts to contact Mr. Leonard, but that none were successful. N.T., 7/5/11, at 16. Indeed, trial counsel testified that he called Mr. Leonard four or five times. ***Id.*** Further, Mr. Leonard testified at the PCRA evidentiary hearing that he was intoxicated on the night in question and did not remember who had started the fight. N.T., 8/25/11, at 6. Thus, Appellant has failed to show that Mr. Leonard was available to testify or that the absence of Mr. Leonard's testimony denied Appellant a fair trial. ***Johnson***, 966 A.2d at 536.

Assuming, *arguendo*, that Mr. Mountain may have remembered that one of the victims started the fight, such information would not have aided Appellant's case. The victims never denied that one of them, Brian Stewart, started the fight by throwing the first punch. N.T. 3/11/08, at 45, 83, 110-111. Thus, Appellant has not established that the absence of Mr. Mountain's testimony denied or could have denied Appellant a fair trial. ***See Johnson***, 966 A.2d at 536. Further, Mr. Mountain did not testify at the PCRA

evidentiary hearing. Thus, Appellant has not proven that Mr. Mountain was available to testify or that he was willing to testify. ***Id.***

Finally, Appellant claims that trial counsel was ineffective for failing to object to the entry of Appellant's police interview transcripts into evidence under the Best Evidence Rule. ***See*** Pa.R.E. 1002. Appellant claims that the interviews were not authenticated and could not have been authenticated without Appellant's testimony, and that parts of the transcripts were missing. Appellant's Brief at 16-18. Appellant does not explain why it would have been beneficial to Appellant to exclude this transcript from evidence. Appellant also fails to explain how the transcript might have caused Appellant prejudice.

The Commonwealth explains that admitting the transcripts was a necessary part of defense counsel's trial strategy. At trial, Appellant argued self-defense. The Commonwealth asserts that admitting the interviews into evidence was necessary for defense counsel to establish Appellant's version of the events that took place without requiring Appellant to take the stand. Commonwealth's Brief at 14. Further, the Commonwealth argues that there was no legal basis, whether based on the Best Evidence Rule or on other grounds, upon which an objection to the transcripts could be based. N.T., 7/5/11, 93. Appellant has made no argument as to why his trial counsel's strategy was unreasonable or how he was prejudiced by counsel's failure to object to the interview's admission into evidence. ***See Miller***, 987 A.2d at 648. This issue merits no relief.

In each of his claims, Appellant has failed to satisfy at least one of the requirements to prove ineffective assistance of counsel. "A defendant's failure to satisfy even one of the three [ineffective assistance of counsel] requirements results in the denial of relief." ***Id.*** Accordingly, we affirm the PCRA court's order denying relief.

Order affirmed. Jurisdiction relinquished.