NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ADREESE B. ALSTON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3510 EDA 2012

Appeal from the Order entered November 30, 2012,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0010363-2007.

BEFORE: ALLEN, COLVILLE,* and STRASSBURGER,* JJ.

MEMORANDUM BY ALLEN, J.: **FILED AUGUST 28, 2013**

Adreese B. Alston ("Appellant") appeals *pro se* from the order denying his petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. sections 9541-46. We affirm.

The pertinent facts and procedural history have been summarized as follows:

> [O]n March 12, 2007, at approximately 7:15 p.m., Philadelphia Police Officer Christopher Harper responded to a shooting in the area of 80th and Ogontz Avenue in Philadelphia. Upon arriving at the scene, Officer Harper observed the victim, Clarence Franklin, lying face down in the street in front of Lee's Market. Franklin had suffered a gunshot wound to his left rib cage. He was taken to the hospital where he was pronounced dead at 8:08 p.m. The autopsy determined that he died as a result of the gunshot

*Retired Senior Judge assigned to the Superior Court.

wound, and the bullet was recovered and submitted to the Firearms Identification Unit (FIU) for analysis.

Detective Steven Grace of the Special Investigations Unit also responded to the shooting scene and discovered that a surveillance camera outside Lee's Market had captured Franklin's shooting. The tape also revealed that there was a female witness to the shooting, later identified as Lisa Pilgrim. Pilgrim subsequently gave a statement to detectives implicating Appellant and his brother, Malik Alston. She also identified Appellant's photograph. A fired cartridge case (FCC) stamped with ".45 Auto RP" was also found at the scene.

Based on this evidence, Appellant was taken into custody on March 19, 2007, and a search warrant was executed at his home. Pursuant to that warrant, police found a .22 caliber revolver loaded with six live rounds, three boxes of ammunition, sixteen bags of alleged marijuana, and $190.00 in United States currency. Additionally, several items of clothing were confiscated and submitted for analysis. Appellant was transported to the Homicide Unit where he was administered warnings pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966), and interviewed by Detective Robert Fetters.

Appellant then gave a statement indicating that he regularly sold marijuana in the area of 80th and Ogontz Avenue. He told Detective Fetters that approximately four weeks prior to the shooting, Franklin and Keith Kennedy had robbed him of his money, drugs, and a firearm. Franklin took his marijuana, money and pills and Kennedy took his .380 caliber FEG firearm. Two weeks prior to that Franklin and Kennedy robbed him of $500.00. Franklin and Kennedy told Appellant that they intended to rob him every time they saw him selling drugs on that corner. Shortly before the shooting, Appellant saw Kennedy inside Lee's Market. Kennedy had his hand on his waist as if he had a gun. Appellant told Kennedy to step outside, but Kennedy refused. Appellant called the co-defendant, Alston, told him that Franklin and Kennedy had robbed him and asked Alston to come and help him. When Alston arrived, Appellant pointed Franklin out to him saying, 'He's right there.' Appellant stated that he thought Alston was going to beat Franklin up. Alston went over to Franklin,

questioned him about the robberies, and when Franklin denied involvement, Alston pulled his gun and attempted to smack Franklin with it. Alston then fired once at Franklin. Appellant thereafter fired two shots from his .22 caliber revolver, the same gun [later] recovered pursuant to the warrant. Alston then ran toward the vehicle he had arrived in which was parked nearby, and Appellant ran around the corner and waited for the bus. Appellant reviewed, signed and dated each page of the statement March 19, 2007, 2:10 [p.m.], indicating that it was accurate.

Based on Appellant's statement, police officers apprehended Alston on April 11, 2007. In Alston's possession they found a black Smith & Wesson .45 caliber hand gun which the officers sent to the FIU for examination. FIU determined that the bullet recovered from Franklin's chest had been fired from that weapon. Appellant and Alston were both charged with homicide, conspiracy, PIC, and VUFA. They were tried as co-defendants.

At their [bench] trial, eyewitness Pilgrim testified that she was friends with Franklin, and had met Appellant through him. Just prior to the shooting, she and Franklin were together smoking crack in the alleyway next to Lee's Market. As they were walking through the alleyway back toward Upsal Street, Appellant and Alston walked up to Franklin and an angry verbal exchange ensued between Franklin and Alston. Pilgrim observed Alston hit Franklin with a black gun, then shoot him. She made the observations from approximately six feet away under sufficient lighting. In addition, Pilgrim testified that she did not know Alston, but had purchased drugs from Appellant on at least two occasions.

Appellant also testified at trial. Appellant testified that he could not read, was addicted to Xanax, [PCP], and marijuana, was paranoid schizophrenic and heard voices. Also, he had been placed in the custody of the Department of Human Services as a youth. In addition, he suffered from crippling arthritis. About an hour and a half prior to the shooting, Appellant had ingested the drug ecstasy and was smoking PCP which made him paranoid. Appellant further testified that he sold drugs on the corner of Upsal

Street and had been robbed by Franklin and Kennedy on at least two occasions. Franklin and Kennedy also told him that they would rob him every time they observed him selling drugs. Appellant testified that he was tired of getting robbed by Franklin and Kennedy. He called Alston because he needed back-up and he knew Alston's .9 millimeter gun was larger than his .22 caliber revolver. He testified that he fired two shots after watching Alston fire at Franklin.

Appellant also presented the testimony of an expert, Dr. Steven Samuel, clinical psychologist. Dr. Samuel testified that he interviewed Appellant on four occasions, administered several tests, and spoke with Appellant's relatives. He determined that Appellant was mildly retarded. In addition, he suffered from post traumatic stress disorder, drugs and major depressive psychosis. Appellant informed Dr. Samuel that he had begun using drugs at age thirteen and that, from about 6:30 p.m. on the day of the shooting, he ingested up to six Xanax, ecstasy pills, and smoked two blunts of PCP. Based on Appellant's mental illness, chronic post traumatic stress disorder and major depressive psychosis, combined with drug use, Dr. Samuel opined that Appellant lacked the capacity to form the specific intent to kill.

Following this testimony, Appellant and Alston were both found guilty on all charges. For the charge of homicide, they were convicted of murder in the first degree. On February 6, 2009, Appellant was sentenced to life imprisonment without the possibility of parole for the first degree murder conviction. He also received a term of imprisonment of five to ten years for the conspiracy conviction, twelve to twenty-four months' incarceration for the PIC charge, and twelve to twenty-four months' imprisonment for the charge of VUFA. All sentences were imposed to run concurrently to one another. Appellant filed timely post-sentence motions, arguing that the verdict was against the weight of the evidence and that there was insufficient evidence to support his convictions for first degree murder, conspiracy, and PIC. Specifically, he contended that the Commonwealth failed to prove that he had the specific intent to kill Franklin.

> On June 16, 2009, Appellant's post-sentence motions were denied by operation of law.

Commonwealth v. Alston, 6 A.3d 555 (Pa. Super. 2010), unpublished memorandum at 1-5 (citations omitted).

Appellant filed a timely appeal to this Court in which he challenged the sufficiency of the evidence supporting his murder conviction because he was unable to form the specific intent to kill, and even if he could, there was no shared intent with his co-defendant. Rejecting these claims, we affirmed Appellant's judgment of sentence on July 9, 2010. ***Alston***, ***supra***. On December 1, 2010, our Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Alston***, 13 A.3d 473 (Pa. 2010).

On November 23, 2011, Appellant filed a *pro se* PCRA petition and the PCRA court appointed counsel. On August 28, 2012, PCRA counsel filed a no-merit letter and a petition to withdraw pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). After a review of the no-merit letter, and an independent review of the record, the PCRA court, on September 5, 2012, issued Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's PCRA petition without a hearing. Appellant filed a response on September 24, 2012. By order entered November 30, 2012, the PCRA court dismissed Appellant's petition, and granted PCRA counsel's petition to withdraw. This appeal followed. The PCRA court did not require Pa.R.A.P. 1925 compliance.

In this appeal, Appellant claims that the PCRA court erred and/or abused its discretion by not concluding that trial counsel was ineffective for failing to: 1) file a suppression motion; 2) file a severance motion; and 3) hire an investigator to find a witness who saw someone remove a gun from the victim after the shooting. ***See*** Appellant's Brief at 4. We disagree.

In reviewing the propriety of an order granting or denying PCRA relief, an appellate court is limited to ascertaining whether the record supports the determination of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). We pay great deference to the findings of the PCRA court, "but its legal determinations are subject to our plenary review." ***Id.*** Furthermore, to be entitled to relief under the PCRA, the petitioner must plead and prove by a preponderance of the evidence that the conviction or sentence arose from one or more of the errors enumerated in section 9543(a)(2) of the PCRA. One such error involves the ineffectiveness of counsel.

To obtain relief under the PCRA premised on a claim that counsel was ineffective, a petitioner must establish by a preponderance of the evidence that counsel's ineffectiveness so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. ***Id.*** "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.*** This requires the petitioner to demonstrate

that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) petitioner was prejudiced by counsel's act or omission. ***Id.*** at 533. A finding of "prejudice" requires the petitioner to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** In assessing a claim of ineffectiveness, when it is clear that appellant has failed to meet the prejudice prong, the court may dispose of the claim on that basis alone, without a determination of whether the first two prongs have been met. ***Commonwealth v. Travaglia***, 661 A.2d 352, 357 (Pa. 1995). Counsel cannot be deemed ineffective for failing to pursue a meritless claim. ***Commonwealth v. Loner***, 836 A.2d 125, 132 (Pa. Super. 2003) (*en banc*), *appeal denied*, 852 A.2d 311 (Pa. 2004).

Appellant first claims that trial counsel was ineffective for failing to file a motion to suppress the statement he gave to the police. "When, as in this case, an assertion of ineffective assistance of counsel is based upon the failure to pursue a suppression motion, proof of the merit of the underlying suppression claim is necessary to establish the merit of the ineffective assistance of counsel claim." ***Commonwealth v. Carelli***, 546 A.2d 1185, 1189 (Pa. Super. 1988) (citations omitted). According to Appellant, his statement was "harmful" to his case, and trial counsel "never investigated the fact that [he] was high off Xanax pills and other drugs during

interrogation . . . [and he did not] know if [he] was coming or going at the time." Appellant's Brief at 13. Appellant supports his argument with no more than his self-serving assertions. The PCRA court dismissed Appellant's claim because Appellant's "assumptions are absolute unfounded speculation." PCRA Court Opinion, 2/25/13, at 6-7. We agree. Claims of trial counsel's ineffectiveness are not self-proving and therefore cannot be raised in a vacuum. ***See generally***, ***Commonwealth v. Pettus***, 424 A.2d 1332 (Pa. 1981). Thus, because Appellant has failed to establish prejudice, his first claim of trial counsel's ineffectiveness fails. ***Travaglia***, ***supra***.

Appellant next claims that trial counsel was ineffective for failing to file a motion to sever his case from that of his co-defendant. "Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Pa.R.Crim.P. 582(A)(2). "The court may order separate trials of offenses of defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. 583. Stated differently, separate trials for co-defendants "should be granted only where the defenses of each are antagonistic to the point where such individual differences are irreconcilable and a joint trial would result in prejudice." ***Commonwealth v. Rainey***, 928 A.2d 215, 232 (Pa. 2007) (citation omitted). Joint trials are encouraged when judicial

economy will be promoted by avoiding expensive and time-consuming duplication of evidence, ***Commonwealth v. Jones***, 668 A.2d 491 (Pa. 1995), and when criminal conspiracy is charged. ***Commonwealth v. Cull***, 688 A.2d 1191, 1197 (Pa. Super. 1997).

The decision of whether to sever trials of co-defendants is within the sound discretion of the trial court. ***Commonwealth v. Lopez***, 739 A.2d 485, 501 (Pa. 1999). Here, the trial court rejected Appellant's claim of ineffectiveness because the defense theories of both Appellant and his co-defendant were not antagonistic. PCRA Court Opinion, 2/25/13, at 6. Our review of the record supports this determination. Additionally, because Appellant was charged with conspiracy, a joint trial was proper. Thus, because trial counsel cannot be faulted for failing to pursue a meritless claim, Appellant's second claim of ineffectiveness fails. ***Loner***, ***supra***.

In his final challenge to trial counsel's effectiveness, Appellant asserts that trial counsel was ineffective for failing to hire an investigator to find a potential witness who saw someone remove a gun from the victim after the shooting. In order to establish that trial counsel was ineffective for failing to investigate and/or call a witness at trial, a PCRA petitioner must demonstrate that:

> (1) the witness existed; (2) the witness was available; (3) trial counsel was informed of the existence of the witness or should have known of the witness's existence; (4) the witness was prepared to cooperate and would have testified on appellant's behalf; and (5) the absence of the testimony prejudiced appellant.

Commonwealth v. Hall, 867 A.2d 619, 629 (Pa. Super. 2005) (quoting ***Commonwealth v. Bomar***, 826 A.2d 831, 856 (Pa. 2003)).

Within his argument for this claim, Appellant baldly asserts he can meet each factor enumerated in ***Hall***, ***supra***. Yet even on appeal, Appellant has failed to identify this alleged witness, other than stating that he is now deceased. Once again, claims of ineffectiveness are not self-proving. ***Pettus***, ***supra***. The PCRA court found that even had Appellant identified the witness, he failed "to demonstrate how, in light of his confession, the absence of testimony that a gun was removed from the decedent while he lay on the ground after being shot prejudiced him." PCRA Court Opinion, 2/25/13, at 8. Our review of the record supports this determination. Thus, Appellant's failure to demonstrate prejudice renders his ineffectiveness claim unavailing. ***Travaglia***, ***supra***.

In sum, because Appellant's claims of ineffectiveness are without merit, we affirm the PCRA court's order denying post-conviction relief.

Order affirmed.

Judge Strassburger files a Concurring Memorandum Statement.

Judgment Entered.

Prothonotary

Date: 8/28/2013