NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ALFON BROWN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 488 WDA 2013

Appeal from the Order entered February 1, 2013,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0006494-2005
& CP-02-CR-0006950-2005.

BEFORE: BOWES, ALLEN, and LAZARUS, JJ.

MEMORANDUM BY ALLEN, J.: **FILED DECEMBER 03, 2013**

Alfon Brown ("Appellant"), appeals *pro se* from the denial of his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.

The pertinent facts have been summarized as follows:

> The following evidence was adduced at trial. Kevilin Middleton hosted a party at his residence located at 8610 Westwood Road, in Penn Hills, Pennsylvania (hereinafter referred to as the "residence"), and arranged for exotic dancers to perform during the party for the payment of $200.00. Three females arrived to perform exotic dancing after midnight on February 20, 2005: Helen McCorkle, (whose working name was "Odyssey"), Geneva Burrell, (whose working name was "Black Cherry"), and Angel Potter, (whose working name was "Spice").
>
> Kevilin Middleton, T.C. Lyerly and Chaoe Davis were the only people remaining at the residence when the dancers arrived. Ms. McCorkle and Ms. Potter intended on performing the exotic dance. Mr. Middleton did not like

> Ms. Potter's appearance, and insulted her and refused to pay her to dance. Ms. Burrell was unwilling to dance despite Mr. Middleton's insistence that she dance instead of Ms. Potter. Mr. Middleton, Ms. Potter, and Ms. Burrell argued over the payment of the dancers; and then both Ms. Potter and Ms. Burrell made cell phone calls to some of the co-defendants. [Appellant] is the father of Ms. Potter's child and she called him in distress after the argument.
>
> Ms. McCorkle went outside after the argument. As she waited for the other women to leave the residence, she saw a vehicle drive up to the residence and saw four men exit the vehicle and approach the residence. Ms. McCorkle recognized [Appellant] as the first man to enter the residence and Mr. Middleton (a victim) testified that the first man to enter the house asked for money then shot Chaoe Davis.
>
> [Ms.] McCorkle also recognized Ramone Coto and Erik Surratt as they entered the residence. The remaining man was wearing a ski mask, and Ms. McCorkle did not recognize him. However, [Ms.] Burrell identified Richard Cunningham as the man who entered the house wearing a ski mask. Additionally, Richard Cunningham's fingerprints were found on the interior storm door.
>
> Ms. McCorkle testified that Ramone Coto and Erik Surratt entered the residence with firearms. Ms. Potter and Ms. Burrell saw Erik Surratt in the residence with a large firearm. T.C. Lyerly and Chaoe Davis were killed during the shooting/burglary and [Mr.] Middleton was severely injured.

Commonwealth v. Brown, 998 A.2d 1009 (Pa. Super. 2010), unpublished memorandum at 2-3 (citation omitted).

Appellant was subsequently arrested and charged with criminal homicide and related charges. He was tried in a joint, non-jury trial with co-defendants, Coto, Surratt and Cunningham. On February 8, 2008, the trial court found Appellant guilty of two counts of second-degree murder, and one

count each of burglary and conspiracy. On April 28, 2008, the trial court sentenced Appellant to two concurrent terms of life imprisonment without parole for the homicide convictions, and a consecutive term of eight to sixteen years of imprisonment for the remaining charges.

Appellant filed a timely appeal to this Court, in which he challenged the sufficiency of the evidence supporting his convictions, and alleged trial court error in denying his motion for dismissal pursuant to Pa.R.Crim.P. 600 and his motion for severance. Finding no merit to these claims, on April 14, 2010, we affirmed Appellant's judgment of sentence. ***Brown***, ***supra***. On September 9, 2010, our Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Brown***, 8 A.3d 340 (Pa. 2010).

Appellant filed a timely *pro se* PCRA petition on June 29, 2011, in which he raised twenty-five claims. The PCRA court appointed counsel. Thereafter, on October 30, 2012, PCRA counsel filed a petition to withdraw and a no-merit letter pursuant to ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). On December 14, 2012, the PCRA court filed Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's PCRA petition without a hearing, and granted PCRA counsel's petition to withdraw. Appellant filed his response on January 7, 2013. By order entered February 1, 2013, the PCRA court denied Appellant's petition. This timely *pro se* appeal followed. The PCRA court did not require Pa.R.A.P. 1925 compliance.

Appellant raises the following issues:

> A). Whether the [PCRA] court erred in finding that, in violation of [Appellant's] right to effective assistance of trial counsel, as guaranteed by the United States Constitution, and the Fifth, Fourteenth, and Sixth Amendments, where trial counsel failed to raise statute 506 "Use of force for protection of others", on [Appellant's] behalf at trial, had no merit? [sic]
>
> B). Whether trial counsel was ineffective for failing to adequately research [the Commonwealth's] "Notice of Joinder", where the notice was not legally binding, in compliance with Pa.R.Crim.P. 582?

Appellant's Brief at 5.[1]

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

---

[1] The Commonwealth did not file a brief.

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.*** 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).

Additionally, a PCRA petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated errors or defects in 42 Pa.C.S.A. section 9543(a)(2), and that the issues he raises have not been previously litigated. ***Commonwealth v. Carpenter***, 725 A.2d 154, 160 (Pa. 1999). An issue has been "previously litigated" if the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or if the issue has been raised and decided in a proceeding

collaterally attacking the conviction or sentence. ***Carpenter***, 725 A.2d at 160; 42 Pa.C.S.A. § 9544(a)(2), (3). If a claim has not been previously litigated, the petitioner must then prove that the issue was not waived. ***Carpenter***, 725 A.2d at 160. An issue will be deemed waived under the PCRA "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding." 42 Pa.C.S.A. § 9544(b).

Appellant first claims that trial counsel was ineffective for failing to raise as a defense the "[u]se of force for the protection of other persons," pursuant to section 506 of the Crimes Code, to justify his actions at the time of the incident. 18 Pa.C.S.A. § 506. He explains:

> It is [Appellant's] contention that he and his colleagues did not have the intent of committing a crime when they entered [Mr.] Middleton's residence, and they were furthermore, privileged to make that nonconsensual entry. Both of those contentions are based on the "defense of others" statute found at Pa.C.S. §506. [Appellant] submits that he and his colleagues were trying to rescue the three women who, they were told, were being unlawfully detained. That being so, they did not commit Felony Murder, Burglary, or Conspiracy to Commit Burglary (Felony Murder requires that the deaths that were caused have occurred during a Burglary, and since Burglary requires and unprivileged entry . . . neither of which exist if [Appellant] and his colleagues were trying to rescue the three female strippers that they were led to believe were being held against their will).

Appellant's Brief at 10. According to Appellant, "[t]he weight of the evidence supports the defense of others claim[,]" and trial counsel was ineffective for not raising this defense at trial. ***Id.*** at 14.

Our review of the record reveals that Appellant raised a claim regarding the section 506 defense as part of his sufficiency challenge on direct appeal. Although this Court found the argument waived on appeal, it nevertheless determined that a section 506 defense would have been meritless. We explained:

> We note that the argument set forth in [A]ppellant's brief – that he and his colleagues were privileged to enter the Middleton residence because they entered to ***rescue*** their three female friends upon the belief that the owner would not let the women out of the house – was not raised at trial, and further, was not raised in his concise statement, which alleged that there was insufficient evidence to support the burglary conviction, and, in turn, the remaining convictions, because the men were ***invited*** to enter the residence by the victims' guests, either [Ms.] Burrell or [Ms.] Potter. Thus, [A]ppellant's present argument is subject to waiver. In any event, [A]ppellant's reliance upon 18 Pa.C.S. § 506 ("Use of force for the protection of others") to advance the argument that he and his colleagues were privileged to make the nonconsensual entry is wholly unfounded since there was no evidence that the "others" were in fear of harm. In fact, one of the women, [Ms.] McCorkle, was standing outside when [A]ppellant and his co-defendants arrived, and the testimony indicated that the men entered the residence brandishing loaded firearms, and one of them asked for money.

Brown, unpublished memorandum at 5, n.6.

Our review of the record supports this Court's previous determination that the trial evidence did not support a section 506 defense. Because trial counsel cannot be deemed ineffective for failing to pursue this meritless claim, Appellant's first claim of ineffectiveness fails.

In his remaining claim, Appellant asserts "trial counsel was ineffective for failing to adequately research [the Commonwealth's] "Notice of Joinder", where the notice was not legally binding, or in compliance with Pa.R.Crim.P. 582[.]" Appellant's Brief at 15. Citing ***Commonwealth v. Collins***, 888 A.2d 564 (Pa. 2005), Appellant asserts the PCRA court erred in determining that the "issue" was "previously litigated" because "a Post-Conviction claim of ineffective assistance of counsel raises a distinct legal ground, rather than an alternative theory in support of the same underlying issue that was raised on direct appeal, and thus ineffectiveness claims are distinct from previously litigated issues and may be brought in Post-Conviction proceedings." Appellant's Brief at 15-16.

While we do not take issue with Appellant's statement of case law, the PCRA court did not find that Appellant's claim was previously litigated. Rather, the PCRA court found that Appellant's ineffectiveness claim was meritless because the underlying claim had been addressed and rejected in Appellant's direct appeal, and counsel cannot be deemed ineffective for failing to pursue a meritless claim. ***See*** Pa.R.Crim.P. 907 Notice, 12/14/12, at 2.

Our review of the record supports the PCRA court's conclusion. In his direct appeal, Appellant raised an argument regarding Pa.R.Crim.P. 582 in support of his appellate issue that a Pa.R.Crim.P. 600 violation occurred. We discussed Appellant's claim as follows:

> Appellant, in making his argument, relies on Rule 582 of the Pennsylvania Rules of Criminal Procedure, which provides, in pertinent part:
>
> > Notice that offenses or defendants charged in separate indictments or informations will be tried together ***shall be in writing and filed with the clerk of courts. A copy of the notice shall be served on the defendant at or before arraignment.***
>
> Pa.R.Crim.P. 582(B)(1) (emphasis supplied). While the Commonwealth did provide notice on the information sheet that [A]ppellant's case was "linked" with other cases on an attached sheet, and that attached sheet listed, *inter alia*, the prosecutions of Coto and Surratt, the record reveals that the Commonwealth did not file a formal motion to "join" the cases. [On June 19, 2007, prior to the beginning of testimony, the Commonwealth did file a motion to consolidate pursuant to Rule 582, requesting the trial court to consolidate the cases of Appellant, Erik Surratt, Ramone Coto, and Richard Cunningham. Appellant responded by filing the Rule 600 motion to dismiss. On that same date, the trial court denied Appellant's motion.] Thus, [A]ppellant maintains that the Commonwealth's failure to conform to Rule 582(B)(1) precluded consideration of the continuances granted in the cases of his co-defendants when considering whether his trial was timely under Rule 600.

Brown, unpublished memorandum at 8 (footnote omitted).

We then rejected Appellant's claim, stating our agreement with the following analysis by the trial court:

> In the instant case, the Commonwealth did not engage in misconduct or attempt to compromise [Appellant's] speedy trial rights. Rule 582 does not require the Commonwealth to provide any ***specific form of notice*** informing the defendant that his case will be tried together with other co-defendants. Although the notice provided by the Commonwealth was substandard, [Appellant] knew his case was joined with the co-defendants. Rule 600 was not violated. A delay that is attributable to a co-defendant will be excluded from a defendant's Rule 600 calculation when the cases are joined together. Therefore, [the trial court] properly denied the Rule 600 motion.

Brown, unpublished memorandum, at 11-12 (citation omitted). Additionally, we concluded that "[a]lthough [A]ppellant contends that the failure of the Commonwealth to "abide by strict procedural rules should be considered as an act of bad faith," [Appellant's Brief at 32,] the record reflects that the Commonwealth did provide notice that the cases were "linked," and the parties regarded the cases as joined together. ***Id.*** at 12.

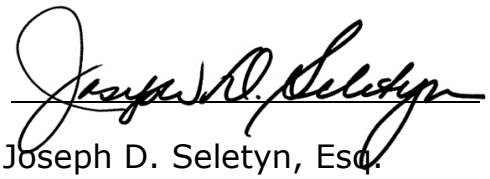
Our review of the record supports this Court's prior determination that Appellant's reliance upon a "defective" Rule 582 notice of joinder is without merit. Thus, as the PCRA court concluded, Appellant's trial counsel cannot be deemed ineffective for failing to "adequately research" this issue. ***Loner***, ***supra***. Indeed, in asserting his ineffectiveness claim, Appellant proffers no additional helpful information that trial counsel could have discovered had he "adequately researched" the issue. Claims of ineffectiveness cannot be raised in a vacuum. ***Commonwealth v. Thomas***, 783 A.2d 328, 333 (Pa. Super. 2001). "This Court will not consider claims of ineffectiveness without some showing of factual predicate upon which counsel's assistance may be

evaluated." ***Id.*** (citation omitted). Appellant's final claim amounts to no more than "bare assertions" that provide no basis for a conclusion that counsel was ineffective. ***Thomas***, 783 A.2d at 333.

In sum, because both of Appellant's ineffectiveness claims lack merit, we affirm the PCRA court's order denying post-conviction relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013