NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KEVIN ROBY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 505 MDA 2013

Appeal from the Order entered January 31, 2013,
in the Court of Common Pleas of Lackawanna County,
Criminal Division, at No(s): CP-35-CR-0003347-2008.

BEFORE: SHOGAN, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY ALLEN, J.: **FILED NOVEMBER 25, 2013**

Kevin Roby ("Appellant") appeals from the order denying his petition for relief filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. sections 9541-46.[1] We affirm.

The PCRA court summarized the pertinent facts and procedural history as follows:

---

[1] Appellant's counsel has filed a purported brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), even though a request to withdraw from representation of a defendant in an appeal from the denial of post-conviction relief is properly made via a no-merit letter and 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*). Although counsel has included within his brief a copy of a letter he sent to Appellant claiming he was seeking to withdraw, counsel has not filed such a motion with this Court. Thus, as there is no motion to consider, we reach the merits of Appellant's claim.

> On April 14, 2009, following a jury trial, [Appellant] was found guilty of possession with intent to deliver and possession of drug paraphernalia. These charges arose on December 5, 2008, when the Scranton Police Department executed a search of [Appellant's] residence and found 1093 bags of heroin, packaging materials for heroin, and $17,700 in currency.
>
> On August 25, 2009, [Appellant] was sentenced to five to twelve years on the possession with intent to deliver charges, and six months to one year on the possession of drug paraphernalia charge, to be served concurrently.
>
> [Appellant's] counsel filed a Notice of Appeal on September 29, 2009. On May 27, 2010, the Superior Court affirmed the judgment of sentence. [***Commonwealth v. Roby***, 4 A.3d 208 (Pa.Super. 2010) (unpublished memorandum)]. [Appellant] filed a petition for allowance of appeal to the Pennsylvania Supreme Court which was denied on January 31, 2011. [***Commonwealth v. Roby***, 14 A.3d 827 (Pa. 2011).]
>
> On January 4, 2012, [Appellant] filed a [*pro se*] PCRA petition. On January 5, 2012, [PCRA counsel] was appointed to represent him. On January 30, 2012, the Commonwealth filed an answer and motion to dismiss. On January 15, 2013, a hearing was held.

PCRA Court Opinion, 1/31/13, at 1-2. By order entered January 31, 2013, the PCRA court denied Appellant's PCRA petition. This timely appeal followed. The PCRA court did not require Pa.R.A.P. 1925 compliance.

Appellant raises the following issue:

> **Was the Trial Counsel ineffective for failing to call a witness at the Omnibus Pretrial hearing?**

Appellant's Brief at 4.

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 filed an omnibus pretrial motion in which he sought to suppress the evidence seized following the police search of his residence. Appellant challenged the trial court's denial of this motion in his direct appeal to this Court. Before addressing Appellant's claim, we summarized the facts presented at the suppression hearing as follows:

> On December 5, 2008, Appellant tested positive for marijuana and admitted [to his parole officer] that he had recently smoked marijuana.
>
> That same day, armed with the above information, [Pennsylvania Parole Agent Joseph] Phillips reported to his direct supervisor and a search of Appellant's home was authorized. Before searching Appellant's home, the parole officers conducted a search of Appellant's vehicle and discovered a cellular phone that was ringing frequently. According to Agent Phillips, a cellular phone that rings frequently is often associated with individuals in the business of dealing illegal narcotics. A search team then proceeded to Appellant's residence along with Appellant's girlfriend, Daisy Rodriguez. Ms. Rodriguez provided a key to enter the home.
>
> Within ten minutes of the entry, a state parole officer discovered approximately 1100 stamp bags of heroin in a kitchen cabinet. Approximately thirty seconds after that discovery, another agent indicated that he had found a small amount of marijuana. At that point, the state parole officers ceased the search of the premises. Two other state parole officials, who had been upstairs, upon being told to stop the search, related that they had observed a

> large amount of money in an upstairs bedroom. The amount was later determined to be $2700. The state parole officers thereafter called the Scranton police. After the police arrived at the scene, the parole officers showed the police the evidence that they had obtained. A police officer then informed Ms. Rodriguez what had been discovered and explained that either she could give written permission to search the premises or the police could obtain a warrant. Ms. Rodriguez consented to a search of the residence and signed a permission to search form.
>
> The Scranton police aided by the state parole officers subsequently undertook a more thorough search of Appellant's residence. In addition to the heroin, marijuana, and money in the bedroom, the police located forty-four Xanax pills, a BB gun, and an additional $15,000 in U.S. currency, which was wrapped in fifteen separate bundles.

Roby, unpublished memorandum at 2-3 (footnote omitted).

Based on these facts, this Court rejected Appellant's claim that the state parole officers lacked a reasonable suspicion to conduct a warrantless search of Appellant's residence. ***Id.***, at 5-8. Additionally, we rejected Appellant's claim that the state parole officers were improperly acting as "stalking horses" for the police. ***Id.*** at 9-10. Thus, this Court concluded that "both the parole agents and the police acted properly in conducting the search and seizure and the suppression court did not err." ***Id.*** at 10.

In so concluding, we noted that Appellant was not challenging the validity of the consent given by Rodriguez to conduct the search. ***Id.***, at 10 n.4. At the January 15, 2013 PCRA hearing, Appellant testified that he had asked trial counsel to call Ms. Rodriquez as a witness at the suppression hearing to testify as to why she signed the consent to search form. N.T.,

1/15/13, at 15. According to Appellant, trial counsel never told him why Ms. Rodriguez was not called at the hearing. Appellant did acknowledge, however, that Ms. Rodriguez testified for the Commonwealth at trial. ***Id.***, at 18-19. On cross-examination, Appellant acknowledged that Ms. Rodriguez was facing similar drug charges because of the police search. Appellant further acknowledged that he heard trial counsel inform the trial court at the suppression hearing that trial counsel had been advised by Ms. Rodriguez's counsel that, if called, she would exercise her Fifth Amendment right against self-incrimination. On redirect, Appellant testified that he wanted trial counsel to take additional steps to compel Ms. Rodriguez to testify at the hearing.

Trial counsel testified that although he wished to call Ms. Rodriguez to the stand, he was informed by her counsel that she would not testify because she "had a deal in place" with the Commonwealth. ***Id.*** at 34. Trial counsel further testified that, prior to the suppression hearing, he had extensive conversations with Appellant and Ms. Rodriguez regarding whether she would testify. According to trial counsel, Ms. Rodriquez was going to testify falsely that she was solely responsible for all of the contraband because she, unlike Appellant, did not have a prior record. ***Id.*** at 36.

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)).

Here, the PCRA court determined that Appellant failed to meet his burden under the ***Hall*** test, and explained:

> [Trial] counsel cannot be deemed ineffective for failing to do something which it was impossible for him to do. [Ms. Rodriguez's counsel] informed the court that she would not testify because he was advising her to invoke the Fifth Amendment. Contrary to [Appellant's] assertions, [trial counsel] could not have forced Ms. Rodriguez to testify or argued more to get her to testify. Counsel cannot be deemed ineffective for failing to raise a baseless claim. ***Commonwealth v. Reyes***, 870 A.2d 888 (Pa. 2005).

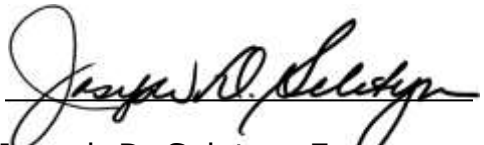
PCRA Court Opinion, 1/31/13, at 5.

Our review of the record supports the PCRA court's conclusion that Ms. Rodriguez's exercise of her Fifth Amendment right against self-incrimination rendered her unavailable to testify for Appellant at his suppression hearing. Thus, Appellant is unable to establish trial counsel's ineffectiveness with regard to the failure to call a witness. ***Hall***, ***supra***.

Order affirmed.

Judge Shogan files a Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013