

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

MARVIN JACKSON

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 516 WDA 2012

Appeal from the PCRA Order of March 1, 2012  
In the Court of Common Pleas of Erie County  
Criminal Division at No(s): CP-25-CR-0003034-2008

BEFORE: STEVENS, P.J., BENDER, J., and WECHT, J.

MEMORANDUM BY WECHT, J.

Filed: March 12, 2013

Marvin Jackson ["Appellant"] appeals *pro se* from the March 1, 2012 order denying his Post-Conviction Relief Act ["PCRA"]<sup>1</sup> petition without a hearing. We affirm.

On direct appeal, we summarized the facts of this case as follows:

On October 16, 2008, a long-time Confidential Informant ("CI") informed Detective Donald Dacus of the Erie Police Department of Appellant's drug dealing activity. Police subsequently set up two controlled "drug buys" from Appellant by CI. Via surveillance, police watched Appellant travel from his residence to the drug buys, and back to his residence. After the second "buy", CI informed police that Appellant had indicated that he was getting low on supply and was planning a trip to Detroit the next day in order to get an additional supply of drugs. Police watched Appellant's residence the next day and observed that his vehicle was not at that location. That evening, CI informed

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<sup>1</sup> 42 Pa.C.S. §§ 9541-46.

Detective Dacus that he had spoken with Appellant and that Appellant indicated he was returning from Detroit and had more drugs. Police then set up surveillance at Appellant's residence.

At approximately 11:00 p.m., CI called Detective Dacus and informed him that Appellant was 20 minutes away. Appellant's vehicle arrived at his residence at 11:25 p.m. Police immediately approached Appellant's vehicle, opened his door, and asked him to exit. Then Lieutenant Michael Nolan conducted a pat-down search of Appellant's person. During the pat-down, the officer felt a large bulge in the rear of Appellant's pants. The officer grabbed it, but did not remove it. Appellant was handcuffed and taken to the police station, where 57.4 grams of cocaine were removed from Appellant's pants. Appellant was charged with possession with intent to deliver crack cocaine, possession of crack cocaine, and possession of drug paraphernalia.<sup>[2]</sup>

***Commonwealth v. Jackson***, 1956 WDA 2009, at 1-2 (Pa. Super. March 22, 2011) (unpublished memorandum).

On March 24, 2009, Appellant filed a motion requesting that the trial court suppress the crack cocaine evidence. On July 10, 2009, the trial court denied the motion. Appellant was found guilty by jury on all counts, and was sentenced to a term of "6 to 12 years' imprisonment at Count 1 (possession with intent to deliver), and a concurrent term of 6 to 12 months' imprisonment at Count 3 (possession of drug paraphernalia). Count 2 (simple possession) merged for sentencing purposes." PCRA Court Opinion, 2/9/12, at 2. Appellant appealed the trial court's denial of his suppression

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<sup>2</sup> 35 P.S. §§ 780-113(a)(30), (a)(16), and (a)(32), respectively.

motion. On March 22, 2011, in an unpublished memorandum, we affirmed the trial court's ruling. *See Jackson*, 1956 WDA 2009.

Appellant then sought relief through the PCRA. The PCRA court summarized the procedural history following Appellant's PCRA petition as follows:

On December 2, 2011, [Appellant] filed a timely *pro se* PCRA petition. In his petition, [Appellant] listed the following issues: (1) whether it was error not to allow [Appellant] to face his accuser; (2) whether [trial] counsel was ineffective not to object to hearsay evidence; (3) whether it [a] was violation [by] [the] [C]ommonwealth not to give discovery of accuser to defense; (4) whether the [trial] court erred in not allowing the request of disqualifying jurors with fixed bias; and, (5) whether it was a violation to convict [Appellant] on a statement made after his arrest without reading him his *Miranda*<sup>[3]</sup> rights.

On December 7, 2011, this Court appointed PCRA counsel. On January 23, 2012, PCRA counsel filed a *Turner/Finley*<sup>3</sup> "no-merit" letter and a Petition To Withdraw As Counsel And For Extension Of Time For Pro Se Defendant to File An Amended/Supplemental P.C.R.A. Petition. In the no-merit letter, PCRA counsel addressed [Appellant's] claims, detailing the nature and extent of her review. PCRA counsel served the [Appellant] with copies of her no-merit letter and petition, and advised him of his right to proceed *pro se* or with the assistance of privately retained counsel.

<sup>3</sup> *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (en banc).

PCRA Court Opinion, 2/9/12, at 2-3 (citations omitted) (minor modifications for clarity).

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<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 467 (1963).

On February 9, 2012, the PCRA Court denied Appellant's petition without a hearing and permitted Appellant's counsel to withdraw. On March 1, 2012, Appellant filed a timely *pro se* notice of appeal.<sup>4</sup> In response, the Commonwealth filed a letter stating that it did not believe that a responsive brief was necessary and that it did not intend to file one. Commonwealth Letter, 5/31/12. Appellant raises the following issues for our review:

- 1) Was it error of the court not to allow appellant to face his accuser in his pretrial motion hearing or any other proceeding, or just ineffective [*sic*] of counsel to request this constitutional right to face his accuser, and then for counsel not to object to hearsay evidence?
- 2) Whether it was ineffectiveness of counsel to neglect and failure [*sic*] of his duties to motion the court to suppress a statement made by his client, violating appellant's constitutional rights of Miranda[?]
- 3) Did the trial court abuse its discretion in rejecting appellant's one voir dire question probative to disqualifying jurors with fixed bias, and counsel ineffective not to object on the record?

Appellant's Brief at 12, 20, 26.

Our standard of review over an appeal from the denial of PCRA relief is as follows:

[W]e must determine whether the ruling of the PCRA court is supported by the record and is free of legal error. The PCRA court's credibility determinations are binding on this Court when they are supported by the record. However, this Court applies a *de novo* standard of review to the PCRA court's legal conclusions.

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<sup>4</sup> The PCRA court did not order a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b).

***Commonwealth v. Paddy***, 15 A.3d 431, 441-42 (Pa. 2011) (internal citations omitted).

The purpose of the PCRA is to provide a means of obtaining collateral relief for persons that are serving illegal sentences, or sentences for crimes that they did not commit. 42 Pa.C.S.A. § 9542. To be eligible for post-conviction relief, the petitioner must plead and prove by a preponderance of the evidence that he or she is serving a sentence that resulted from one of the circumstances enumerated in 42 Pa.C.S.A. § 9543(a)(2). One such circumstance exists when the sentence being served is a result of “[i]neffective 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.” 42 Pa.C.S.A. § 9543(a)(2)(ii). The petitioner also must establish that the errors raised in the PCRA petition have not previously been litigated or waived, and that failure to litigate an issue could not have been the result of any “any rational, strategic or tactical decision by counsel.” ***Paddy***, 15 A.3d at 442; 42 Pa.C.S.A. § 9544. An issue is 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.” 42 Pa.C.S.A. § 9544(a)(2). “[A]n issue is waived 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 postconviction proceeding.” 42 Pa.C.S.A. § 9544(b).

Appellant's first issue can be divided into two arguments. First, Appellant challenges as unconstitutional the denial of his opportunity to confront and cross-examine the CI in the pretrial suppression hearing. However, the record indicates that Appellant did not raise this issue at the suppression hearing or anytime thereafter until this PCRA claim. Appellant could have challenged the constitutionality of his asserted deprivation of witness confrontation rights during trial, and he could have asserted the challenge afterwards on direct appeal. He failed to do so. Accordingly, that issue is waived for purposes of this PCRA appeal under section 9544(b); (*Commonwealth v. Bond*, 819 A.2d 33, 40 (Pa. 2002)).

Appellant's first issue next challenges his counsel's effectiveness for failing to raise the confrontation issue and for failing to object to testimony in the suppression on hearsay grounds. To succeed on an ineffective assistance of counsel claim, Appellant must overcome the presumption that counsel is effective. *Paddy*, 15 A.3d at 442. This must be done by pleading and proving each of three elements: "(1) the underlying legal claim has merit; (2) that counsel's action or inaction lacked any reasonable basis; and (3) there is a reasonable probability the ineffectiveness of counsel affected the outcome of the proceedings." *Commonwealth v. Dennis*, 950 A.2d 945, 954 (Pa. 2008) (citing *Commonwealth v. Pierce*, 527 A.2d 973, 975 (Pa. 1987)). Together, these elements form the *Pierce* test. If any one of these elements is not met, the claim of ineffectiveness necessarily fails. *Id.*

Appellant has failed to establish any legal claim that meets all three elements of the *Pierce* test. To the contrary, Appellant's brief contains no actual application of the entire *Pierce* test. A claim of ineffective assistance of counsel is substantively different from the underlying legal claim, and must be treated as a separate issue. *Bond*, 819 A.2d at 40. It is Appellant's responsibility to develop his claims of ineffective assistance of counsel by showing not only that his legal claim has merit, but also that his counsel's action or inaction lacked any reasonable basis, and that this error likely prejudiced Appellant by affecting the outcome of the case. Appellant's argument is devoid of any argument regarding whether trial counsel lacked any reasonable basis for failing to challenge the error, or asserting that the outcome would have been different had any such error not occurred. Therefore, Appellant has not met all three elements of the *Pierce* test. "[B]oilerplate allegations tacked on to waived claims of trial court error do not discharge appellant's burden of proving ineffectiveness." *Bond*, 819 A.2d at 40. Accordingly, we find this claim waived.

For the same reason, we are constrained to find Appellant's next two issues waived. Appellant's second issue is that his counsel was ineffective for failing to seek the suppression of a statement made by Appellant that was allegedly solicited in violation of his *Miranda* rights. In his final issue, Appellant argues that the trial court abused its discretion in denying Appellant's *voir dire* request during jury selection. In each issue, Appellant disregards two of the elements of the *Pierce* test, and instead attacks only

the underlying merits of each claim. Appellant never addresses how his counsel's actions or inaction lacked a reasonable basis, or how the alleged error substantially affected the outcome of the proceedings. Because Appellant again fails to develop his argument with the required elements of the *Pierce* test, both of these claims also are waived.

For the reasons outlined above, the PCRA court was correct to deny Appellant's petition for post-conviction relief.

Order affirmed. Jurisdiction relinquished.