

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DAYLE L. WHEELLOCK,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 549 MDA 2013

Appeal from the PCRA Order entered March 25, 2013,
in the Court of Common Pleas of Lycoming County,
Criminal Division, at No(s): CP-41-CR-0001314-2003.

BEFORE: ALLEN, LAZARUS, and FITZGERALD,* JJ.

MEMORANDUM BY ALLEN, J.:

FILED DECEMBER 24, 2013

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

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

On July 22, 2003, [Appellant] was living in an apartment located in the same building as Pappa's Pizza, a restaurant in Picture Rocks, Lycoming County. The co-owner of the restaurant, Greta Evans, was at her business when she was alerted to a large amount of smoke coming from a back room. She believed that the building was on fire and called for assistance. The dispatcher to whom she spoke asked that she attempt to evacuate the building. She grabbed a set of pass keys maintained by her father,

*Former Justice specially assigned to the Superior Court.

the owner of the building, and went through the apartment area of the building, knocking on the doors of the seven apartments and doing her best to be certain that no one was inside. At two of the apartments, one of which was [Appellant's], she did not receive an answer to her knock. She used the pass key to enter the apartment and went through to the other end of the apartment ([Appellant's] bedroom) to be certain no one was there. Along the way to [Appellant's] bedroom and eventually inside of [Appellant's] bedroom, Ms. Evans observed what she felt were disturbing photographs of young boys, many of whom were nude and/or posed in sexually provocative positions. Many of the photographs were arranged in collage form and displayed primarily in [Appellant's] bedroom, although some were also located in the living room. Ms. Evans quickly left the apartment as the building was on fire and she still had to make sure the other apartments were empty. After the fire department declared the building safe, she called the Pennsylvania State Police about the disturbing things she had seen in [Appellant's] apartment. The police obtained a search warrant for [Appellant's] apartment and seized various books, photographs, pictures, paintings, pamphlets, brochures, videotapes and magazines that the police believed depicted child pornography. [Appellant] was arrested and charged with . . . possession of child pornography in violation of . . . 18 Pa.C.S.A. § 6312(d)(1).

[Appellant] filed a motion seeking to suppress the items seized from his apartment, which the suppression court denied. [Appellant] proceeded to trial in April 2004. Midway through the Commonwealth's case, [Appellant] entered a guilty plea to the charges. Prior to sentencing, however, [Appellant] moved to withdraw his guilty plea. The trial court denied this request and ordered a Sexual Offenders Assessment Board ("SOAB") evaluation to determine whether [Appellant] was a sexually violent predator ("SVP"). Following a hearing, the trial court found [Appellant] to be an SVP and sentenced him to a term of three to 31 years of incarceration. On appeal, this Court concluded that the trial court erred in not holding a hearing regarding [Appellant's] request to withdraw his plea. **See Commonwealth v. Wheelock**, 915 A.2d 153 (Pa. Super. 2006) (unpublished memorandum). We

vacated the judgment of sentence and remanded for such a hearing and any further proceedings necessary depending on the resolution of [Appellant's] motion to withdraw his plea. On remand, the trial court permitted [Appellant] to withdraw his guilty plea. A non-jury trial ensued, at the conclusion of which the trial court found [Appellant] guilty of four counts of possession of child pornography in violation of section 6312(d). Following another hearing, [Appellant] was again determined to be an SVP. The trial court sentenced him to an aggregate 75 months to 17 years of incarceration.

On appeal, this Court affirmed [Appellant's] convictions, but reversed his illegal sentence and remanded for re-sentencing. **See** [*Commonwealth v. Wheelock*, 998 A.2d 1005 (Pa. Super. 2010) (unpublished memorandum)]. This Court, relying on *Commonwealth v. Jarowecki*, 985 A.2d 955 (Pa. 2009), specifically concluded that the trial court's application of the sentence enhancement provision under 18 Pa.C.S.A. § 312(d)(2) to grade [Appellant's] conviction on the first count as a third-degree felony and the remaining three convictions as second-degree felonies was illegal. **See** *Wheelock*, 998 A.2d 1005 (unpublished memorandum at 14-16). Thus, this Court remanded for re-sentencing. **See id.** (unpublished memorandum at 16).

On February 7, 2011, the trial court resentenced [Appellant] to an aggregate prison term of 4-17 years. The trial court graded Counts 1-3 as felonies of the third degree and Count 4 as a felony of the second degree. The trial court also found [Appellant] to be an SVP. [Appellant] filed a timely Motion to modify sentence. On May 5, 2011, the trial court amended its previous sentencing Order to correct the grading of Count 4 as a felony of the third-degree, not a felony of the second-degree. The trial court denied the remainder of [Appellant's] Motion.

[Appellant] filed a timely Notice of appeal. Thereafter, [Appellant] through his attorney, filed a [Pa.R.A.P.] 1925(b) Concise Statement, even though the trial court did not order such a statement. [Appellant] filed a Motion to remove his counsel due to counsel's alleged errors during his representation. Following a *Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998) hearing, the trial court

found [Appellant's] waiver of his right to counsel to be knowing and voluntary, and allowed [Appellant] to proceed *pro se*.

Commonwealth v. Wheelock, 48 A.3d 476 (Pa. Super. 2012) (unpublished memorandum at 1-4, citation and footnote omitted).

In his *pro se* appeal, Appellant raised six issues, including a claim that the search warrant in his case was invalid because it was based on perjured testimony, as well as a claim of ineffective assistance of counsel. We found no merit to Appellant's substantive claims, and denied his claim of ineffective assistance of counsel without prejudice to raise the claims in a PCRA. **Wheelock, supra**. With regard to the search warrant claim, this Court concluded that in Appellant's previous appeal, we had rejected Appellant's challenge to probable cause to support the issuance of the search warrant. **See id.**, unpublished memorandum at 6. We specifically stated, "[Appellant's] arguments attacking Ms. Evans's credibility and the dolls found in his apartment, which [Appellant] concedes did not lead to his convictions, do not provide him with a basis for relief in this appeal." **Id.** Appellant did not file a petition for allowance of appeal to our Supreme Court.

On October 2, 2012, Appellant filed a *pro se* PCRA petition, and the PCRA court appointed counsel. On February 11, 2013, PCRA counsel filed a motion 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 February 26, 2013, the PCRA

court filed Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition. Appellant did not file a response. By order dated March 25, 2013, the PCRA court dismissed Appellant's PCRA petition and granted PCRA counsel's motion to withdraw. This timely *pro se* appeal followed. Both Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues in his *pro se* brief:

- (1) Appellant avers the PCRA Court erred as a matter of Law and Constitution in denying Appellant's PCRA, because the Affidavit of Probable Cause was Invalid (due to falsified information) to support the Search Warrant.
- (2) Appellant avers that the PCRA Court erred as a matter of Law and Constitution in denying Appellant's PCRA, because the Search Warrant was invalid.
- (3) Appellant avers that the PCRA Court erred as a matter of Law and Constitution in denying Appellant's PCRA, because the Trial Court lacked Jurisdiction to try the case.
- (4) Appellant avers that the PCRA Court erred as a matter of Law and Constitution in denying Appellant's PCRA, because the Trial Court erred and abused its discretion when it refused to allow the reading of the prior testimony of [the] Commonwealth's Chief Witness, Gretta [sic] Evans, from the First Trial where she recanted her statements made in her initial statement to the police officer, and where she recanted her Suppression hearing testimony.
- (5) Appellant respectfully avers that permission be granted to supplement this Statement of Matters Complained of on Appeal [sic], if necessary, when notes of testimony from the relevant proceedings are obtained.

(6) Appellant avers that PCRA Counsel [] was ineffective as a matter of Law and Constitution for failing to raise the above meritorious claims and for filing a no merit letter.

Appellant's Brief at 7.¹

This Court may only overturn a PCRA court's dismissal of a PCRA petition based on an error of law or an abuse of discretion. ***Commonwealth v. Johnson***, 841 A.2d 136, 140 (Pa. Super. 2003), *appeal denied*, 858 A.2d 109 (Pa. 2004). "Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record." ***Commonwealth v. Daniels***, 947 A.2d 795, 798 (Pa. Super. 2008), *citing Commonwealth v. McClellan*, 887 A.2d 291, 298 (Pa. Super. 2005), *appeal denied*, 897 A.2d 453 (Pa. 2006).

To be eligible for post-conviction relief, a 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

¹ As in Appellant's earlier appeals, the Commonwealth has not filed a brief.

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).

We address Appellant’s first two claims together since they both challenge the validity of the search warrant issued in this case. The PCRA court found that the validity of the affidavit of probable cause supporting the application for the search warrant had been previously litigated, and did not therefore entitle Appellant to post-conviction relief. **See** PCRA Court Opinion, 4/24/13, at 1. Our review of the records supports this conclusion. Indeed, in Appellant’s prior appeal following his non-jury trial conviction, we rejected his claim that there were insufficient facts to support a probable cause finding. **See Wheelock**, 998 A.2d 1005 (Pa. Super. 2010), unpublished memorandum at 5-8. As noted above, in Appellant’s appeal following his resentencing, we rejected his claim that the “search warrant in this case issued improperly as the probable cause affidavit supporting it was based upon perjured testimony[.]” **Wheelock**, 48 A.3d 476 (Pa. Super. 2012), unpublished memorandum at 4. Although Appellant argues an alternative theory in this appeal, *i.e.*, that Ms. Evans “recanted” her statements, this theory does not alter the PCRA court’s proper conclusion

that the validity of the affidavit of probable cause supporting the search warrant has been previously litigated under the PCRA. **Carpenter, supra; Commonwealth v. Burkett**, 5 A.3d 1260, 1270 (Pa. Super. 2010) (citation omitted) (explaining “the fact that a petitioner presents a new argument or advances a new theory in support of a previously litigated issue will not circumvent the previously litigated bar” of the PCRA). Thus, Appellant’s first two issues do not merit relief.

In his third issue, Appellant asserts that the trial court lacked jurisdiction to try his case. In response to Appellant’s Pa.R.A.P. 1925(b) statement, the trial court responded that “[i]t is unclear to what [Appellant] is referring, and, in any event, he had not to this point raised any challenge to this court’s jurisdiction.” Trial Court Opinion, 4/24/13, at 1. We likewise find Appellant’s jurisdictional challenge to be insufficiently developed, and therefore will not consider it further. **See Commonwealth v. Tielsch**, 934 A.2d 81, 93 (Pa. Super. 2007) (holding that undeveloped claims will not be considered on appeal). Moreover, to the extent that Appellant again references the invalidity of the search warrant, we have already determined that that claim does not entitle him to post-conviction relief. **See supra**.

In his fourth issue, Appellant claims the PCRA court should have granted him relief because the trial court erred when it “refused to allow the reading of the prior testimony of [the] Commonwealth’s Chief Witness, Gretta [sic] Evans, from the First Trial where she recanted her statements

made in her initial statement to the police officer, and where she recanted her Supression hearing testimony.” Appellant’s Brief at 7. Because this claim could have been raised in either of Appellant’s prior appeals, it is considered waived under the PCRA. ***Carpenter, supra.***

Nonetheless, the PCRA court addressed Appellant’s claim as follows:

It was never requested at the second trial that such testimony be read into evidence, and thus the court will interpret this allegation of error in the context of a PCRA, as an allegation that trial counsel was ineffective for failing to seek to introduce such testimony. Gretta [sic] Evans provided the information to police which led to the issuance of the search warrant. [Appellant] contends here that Ms. Evans recanted her statement to police at the first trial. The court fails to see how such testimony (even if it did constitute a recantation) would have made a difference in the outcome of the trial as the decision was based on the testimony of the trooper who executed the search warrant, and the description [the trooper] gave of the items found in [Appellant’s] residence, as well as the exhibits introduced as evidence (the items found and photographs of the residence before the items were removed), and even if Ms. Evans changed her story about what she had seen, it would not have affected this court’s determination of the trooper’s credibility. Therefore, as this issue had no merit, trial counsel was not ineffective for having failed to raise it.

PCRA Court Opinion, 4/24/13, at 2 (footnote omitted). In the omitted footnote, the PCRA court explained further: “In any event, the court reviewed Ms. Evans[’s] testimony in the first trial and fails to see how it would have been at all helpful to [Appellant], as she testified that when she went into [Appellant’s] apartment she saw a lot of pictures of `very young

children in odd situations' in the living room and 'naked, totally nude pictures' of 'little boys' in the bedroom." *Id.* at 2 n.3.

Our review of the record supports the PCRA court's conclusions. Moreover, to the extent Appellant asserts in his brief that prior counsel was ineffective for failing to raise this issue, he has made no attempt to meet the tri-partite test regarding such claims. Thus, we will not consider this issue further. *Tielsch, supra.*

In his fifth issue, Appellant improperly reiterates his request that the PCRA court grant him permission to supplement his Pa.R.A.P. 1925(b) statement once he obtains "notes of testimony from the relevant proceedings." Pa.R.A.P. 1925(b) Statement, 4/24/13, at 1. Our review of the record reveals that the PCRA court never granted Appellant permission.² Thus, we need not address Appellant's issue further.

In his sixth and final issue, Appellant assert that PCRA counsel was ineffective for failing to raise Appellant's first four issues. Appellant raised this claim for the first time in his Pa.R.A.P. 1925(b) statement. Appellant did not file a response to the PCRA court's Pa.R.A.P. 907 notice of its intent to dismiss Appellant's appeal. The PCRA court did not address Appellant's claim. Thus, Appellant's claim that PCRA counsel was ineffective is waived.

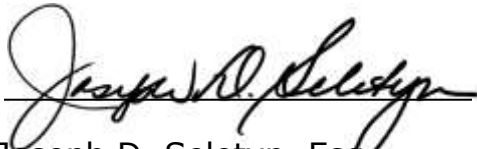
² In an "Addendum" to his appellate brief, Appellant does not raise any additional claims, but rather, cites additional authority in support of his issues.

See generally, *Commonwealth v. Potter*, 58 A.3d 752 (Pa. 2012). Even if not waived, Appellant's ineffectiveness claim is meritless, as we have already determined that his *pro se* claims are without merit.

In sum, because the PCRA court did not commit an error of law or abuse of discretion, Appellant is not entitled to relief, and we affirm the PCRA court's order.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/24/2013

