NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KERI ANN MARIE BREKNE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 563 EDA 2012

Appeal from the Order entered January 19, 2012,
in the Court of Common Pleas of Northampton County,
Criminal Division, at No(s): CP-48-CR-0000677-2008.

BEFORE: PANELLA, ALLEN, and PLATT,* JJ.

MEMORANDUM BY ALLEN, J.: Filed: March 15, 2013

Keri Ann Brekne ("Appellant") appeals from the order denying her petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. sections 9541-9546. We affirm.

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

> On July 9, 2008, Appellant entered pleas of guilty admitting to five counts of aggravated indecent assault as a felony of the second degree under 18 Pa.C.S.A. § 3125(a)(8) governing penetration sexual offenses involving a victim less than 16 years old and an offender four or more years older. The offenses were committed between July of 2007 and January of 2008. Appellant was a New Jersey school teacher who resided in Bethlehem, Pennsylvania. The child victim was a student at the school. The molestation occurred at Appellant's home in Bethlehem and consisted variously of Appellant inserting

*Retired Senior Judge assigned to the Superior Court.

> her finger into the child's vagina, Appellant putting her mouth on the child's vagina and having the child do likewise to her, and Appellant sexually assaulting the child with an artificial penis.
>
> On October 10, 2008, the trial court sentenced Appellant to 36 to 72 months in state prison on each of the five counts of aggravated indecent assault, all to run consecutively to one another, for an aggregate sentence of 180 to 360 months, *i.e.*, 15 to 30 years.

Commonwealth v. Brekne, 988 A.2d 714 (Pa. Super. 2009), unpublished memorandum at 1-2.

Following the denial of Appellant's timely filed post-sentence motion, Appellant filed an appeal to this Court in which she challenged the discretionary aspects of her sentence. On November 20, 2009, we rejected Appellant's claims and affirmed her judgment of sentence. ***Brekne***, ***supra***. On May 27, 2010, our Supreme Court denied Appellant's petition for allowance of appeal. ***Commonwealth v. Brekne***, 996 A.2d 490 (Pa. 2010).

Appellant filed a PCRA petition, and a motion to recuse the trial court from considering her PCRA petition, on December 17, 2010. The PCRA court explained:

> [Appellant's] Motion to Recuse was denied following conference with the Court on or about December 21, 2010, however, it appears that such denial was never reflected on the record. Nonetheless, the denial of the Motion to Recuse was implicit in the fact that a full PCRA hearing was held before [the PCRA court, who was also the trial court], on January 20, 2011. By Opinion and Order of Court dated March 25, 2011, this Court denied [Appellant's] request for relief. [Appellant] appealed to the Superior Court.

> The Superior Court quashed [Appellant's] appeal in a Memorandum Opinion dated January 17, 2012. Thereafter, in an effort to clarify the record, this Court entered an Order dated January 19, 2012, explicitly denying [Appellant's] Motion that had sought recusal . . . and granting [Appellant] the right to appeal the denial of her PCRA petition nunc pro tunc.

PCRA Court Opinion, 5/4/12, at 1-2. This appeal followed.

Appellant raises the following issues:

> I. DID THE PCRA COURT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR RECUSAL?
>
> II. WAS THE PCRA COURT'S DISMISSAL OF THE PCRA PETITION UNSUPPORTED BY THE RECORD AND BASED ON LEGAL ERROR?

Appellant's Brief at 5.

When examining a post-conviction court's grant or denial of relief, we are limited to determining whether the court's findings were supported by the record and whether the court's order is otherwise free of legal error. ***Commonwealth v. Quaranibal***, 763 A.2d 941, 942 (Pa. Super. 2000). We will not disturb findings that are supported in the record. ***Id.*** The PCRA provides no absolute right to a hearing, and the post-conviction court may elect to dismiss a petition after thoroughly reviewing the claims presented, and determining that they are utterly without support in the record. ***Id.***

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. ***Commonwealth v. Johnson***, 966 A.2d 523, 532 (Pa. 2009). Additionally, the petitioner must establish 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).

In her first issue, Appellant claims that the PCRA court abused its discretion when it denied her motion for recusal. According to Appellant, granting recusal was "axiomatic" because her PCRA petition alleged that trial counsel "was ineffective for not challenging [the trial court's] bias and use of improper sentencing factors." Appellant's Brief at 10. Because the PCRA court was also the trial court that sentenced her, "recusal was necessary to ensure the PCRA proceedings were fair and maintained the appearance of fairness." ***Id.*** We disagree.

"In reviewing the denial of a motion to recuse, our standard is abuse of discretion." ***Vargo v. Schwartz***, 940 A.2d 459, 471 (Pa. Super. 2007). "Recusal is required [only] whenever there is substantial doubt as to a jurist's ability to preside impartially." ***Commonwealth v. Fisher***, 681 A.2d 130, 135 (Pa. 1996). "The mere participation by the presiding judge in an earlier stage of the proceeding neither suggests the existence of actual impropriety nor provides a basis for a finding of the appearance of impropriety." ***Commonwealth v. Boyle***, 447 A.2d 250, 252 (Pa. 1982). Indeed, it is the position of our Supreme Court that "it is generally preferable for the same judge who presided at trial to preside over the [PCRA] proceedings since familiarity with the case will likely assist the proper administration of justice." ***Commonwealth v. Pierce***, 786 A.2d 203, 223 (Pa. 1986).

As our Supreme Court has summarized, when considering the possibility of recusal, the trial judge must:

> . . . make an independent, self-analysis of the ability to be impartial. If content with that inner examination, the judge must then decide whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This assessment is a personal and unreviewable decision that only the jurist can make. Once the decision is made, it is final[.]
>
> This Court presumes judges of this Commonwealth are honorable, fair and competent, and, when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice. The party who

> asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the decision by a judge against whom a plea of prejudice is made will not be disturbed except for an abuse of discretion.

Commonwealth v. Whitmore, 912 A.2d 827, 834 (Pa. 2006) (citations omitted). "There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings." ***Id.***

With regard to her recusal motion, we note that Appellant bears the burden of demonstrating that the trial court is biased or prejudiced against her. ***See generally***, ***Commonwealth v. Miller***, 951 A.2d 322 (Pa. 2008). Appellant has failed to meet this burden. Appellant argues that, because the PCRA court "needed to review her own conduct to evaluate whether Appellant's petition had merit, [the PCRA court] was predisposed to find that her sentencing decisions were sound, within her discretion and unbiased." Appellant's Brief at 14. According to Appellant, the court's statements at sentencing "evinced a person[al] and emotional animosity toward [Appellant]." ***Id.*** Although Appellant emphasizes isolated statements made by the trial court during sentencing, our review of the entire sentencing transcript refutes Appellant's claims of bias and/or prejudice.

Moreover, Appellant challenged the discretionary aspects of her sentence on appeal. Finding no merit to Appellant's sentencing claims, this Court, after quoting the trial court's stated reasons, concluded:

> This constitutes a completely adequate statement of reasons for the sentence imposed in that it represents full consideration of the nature and circumstances of the offense, the history and characteristics of Appellant, the pre-sentence investigation report and related reports, the sentencing guidelines, the protection of the public, the gravity of the offense, the impact on the victim, and the rehabilitative needs of Appellant.

Commonwealth v. Brekne, 988 A.2d 714 (Pa. Super. 2009), unpublished memorandum at 11. Given the foregoing, there is no evidence that the PCRA court was predisposed against Appellant's PCRA claims, or "harbored animosity" toward Appellant, where the PCRA court had its stated reasons for Appellant's sentence affirmed as adequate and permissible by this Court. Thus, the PCRA court did not abuse its discretion in denying Appellant's motion for recusal.

In her next issue, Appellant claims that trial counsel "ineffectively argued a sentencing issue in a post-sentence motion and on appeal." Appellant's Brief at 15. Appellant argues that "the sentencing court erroneously found [Appellant] had not accepted responsibility" for her actions because the sentencing court considered factors "irrelevant to her violation of § 3125(a)(8)." ***Id.*** According to Appellant, the sentencing court improperly considered Appellant's assertion that the acts were consensual since the issue of consent is irrelevant to a conviction under section 3125(a)(8). This claim lacks merit.

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.*** 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).

Initially, we note that, insofar as Appellant's claim of ineffectiveness pertains to a discretionary challenge to her sentence, it is previously litigated under the PCRA. ***Carpenter***, ***supra***. In Appellant's direct appeal, counsel asserted that the court erred in sentencing by "concluding that Appellant did not take responsibility for her actions[.]" ***Brekne***, unpublished memorandum at 5 (citing ***Commonwealth v. Mouzon***, 828 A.2d 1126, 1130 (Pa. Super. 2003)). We interpreted this claim as asserting that the sentencing court relied upon an impermissible factor, and rejected the claim on its merits.

Appellant claims that prior counsel was ineffective for failing to object to the personal bias demonstrated by the sentencing court. Our review of the record refutes Appellant's claim. The sentencing court's comments do not suggest a personal bias or animosity, but rather, as we previously found, "constitute[d] a completely adequate statement of reasons for the sentence imposed[.]" ***Brekne***, unpublished memorandum at 11. Appellant's reliance on ***Commonwealth v. Spencer***, 496 A.2d 1156 (Pa. Super. 1985), is inapposite. Unlike the tenor of statements made by the sentencing court in ***Spencer***, the sentencing court's comments in this case, when considered in their entirety, "were not the result of the sentencing judge's personal prejudice, bias, and ill will towards" Appellant. ***Compare Spencer***, 496

A.2d at 1164-65 (sentencing court repeatedly referring to sixteen-year-old defendant as an animal).

In sum, the PCRA court properly denied Appellant's motion for recusal and correctly concluded that Appellant's ineffectiveness claims did not entitle her to relief.

Order affirmed.