NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSEPH BENJAMIN HOCK,	:	
	:	
Appellant	:	No. 570 MDA 2013

Appeal from the Order Entered February 28, 2013,
In the Court of Common Pleas of Lancaster County,
Criminal Division, at No. CP-36-CR-0002818-2009.

BEFORE: DONOHUE, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED MARCH 27, 2014**

Appellant, Joseph Benjamin Hock, appeals *pro se* from the February 28, 2013 order denying his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541–9546. After careful review, we affirm.

Appellant was arrested in May 2009 and charged with involuntary deviate sexual intercourse ("IDSI") with a person less than sixteen years of age, indecent assault of a person less than sixteen years of age, and corruption of minors, related to incidents involving the thirteen-year-old child of his live-in girlfriend. N.T., 3/10/11, at 70–76. A suppression motion was filed and denied after a hearing. In the days preceding March 9, 2011, Appellant failed to appear for trial, and a bench warrant was issued for his

arrest. ***Id***. at 120. When officers eventually located Appellant at his girlfriend's house, he fled; police eventually apprehended him after a struggle. ***Id***. at 120–124. He was tried before a jury beginning on March 10, 2011, and on March 11, 2011, the jury convicted thirty-six-year-old Appellant of all charges. The trial court sentenced him on June 1, 2011, to ten to twenty years of imprisonment.

Appellant filed a timely counseled direct appeal, and we affirmed the judgment of sentence on February 21, 2012. ***Commonwealth v. Hock***, 46 A.3d 822 (Pa. Super. 2012) (unpublished memorandum). Our Supreme Court denied Appellant's petition for allowance of appeal on July 18, 2012. ***Commonwealth v. Hock***, 48 A.3d 1247 (Pa. 2012).

Appellant filed a timely *pro se* PCRA petition on November 2, 2012, raising issues of ineffective assistance of counsel, and the PCRA court appointed counsel. On January 4, 2013, counsel filed 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*). The PCRA court gave notice of its intention to dismiss Appellant's PCRA petition pursuant to Pa.R.Crim.P. 907 on February 8, 2013. Appellant's response, dated February 20, 2013, was filed on February 26, 2013, again asserting the claims of trial counsel's ineffectiveness. The PCRA court dismissed Appellant's PCRA petition without a hearing on February 28, 2013, and

granted counsel's petition to withdraw. This timely appeal ensued. The PCRA court did not order the filing of a statement pursuant to Pa.R.A.P. 1925.

In his PCRA petition, Appellant stated all of his *pro se* allegations under the rubric of ineffective assistance of counsel. He raises two of those issues in his *pro se* brief to this Court:

> 1. Whether [Appellant] was "in custody" for the purposes of Miranda, during a station-house interview by Detective Vance, on or about May 9, 2009.
>
> 2. Whether [Appellant's] trial attorney was constitutionally ineffective for failing to "investigate" Hock's mental impairment prior to trial.

Appellant's Brief at 6.[1]

When reviewing the propriety of an order granting or denying PCRA relief, this Court is limited to determining whether the evidence of record supports the conclusions of the PCRA court and whether the ruling is free of legal error. ***Commonwealth v. Rykard***, 55 A.3d 1177, 1183 (Pa. Super. 2012). We grant great deference to the PCRA court's findings that are supported in the record and will not disturb them unless they have no

[1] We note with disapproval that the Commonwealth's brief is completely non-responsive to the issues Appellant seeks to raise. The Commonwealth, instead, merely espouses the procedural propriety of the PCRA court's grant of counsel's petition to withdraw, an issue that is not before us. Appellant does not assert error by the PCRA court in this regard. Moreover, it clearly is improper for an appellate court to *sua sponte* address the sufficiency of a no-merit letter filed before the PCRA court. ***Commonwealth v. Rykard***, 55 A.3d 1177, 1184 n.2 (Pa. Super. 2012) (citing ***Commonwealth v. Pitts***, 981 A.2d 875, 880 (Pa. 2009)).

support in the certified record. ***Commonwealth v. Rigg***, ___ A.3d ___, 2014 PA Super 11 (Pa. Super. filed January 27, 2014).

As a prefatory matter, we note that the failure to adequately develop arguments and support bald assertions with sufficient citation impedes meaningful judicial review. ***Commonwealth v. Rompilla***, 983 A.2d 1207 (Pa. 2009). We have stated:

> [A]lthough this Court is willing to construe liberally materials filed by a *pro se* litigant, *pro se* status generally confers no special benefit upon an appellant. ***Commonwealth v. Maris***, 427 Pa. Super. 566, 629 A.2d 1014, 1017 n.1 (1993). Accordingly, a *pro se* litigant must comply with the procedural rules set forth in the Pennsylvania Rules of the Court. ***Id***. This Court may quash or dismiss an appeal if an appellant fails to conform with the requirements set forth in the Pennsylvania Rules of Appellate Procedure . . . .
>
> * * *
>
> [I]n the interest of justice we address the arguments that can reasonably be discerned from this defective brief.

Commonwealth v. Lyons, 833 A.2d 245, 252 (Pa. Super. 2003). Although Appellant, to varying degrees, has violated the rules regarding the content of appellate briefs, the defects in Appellant's brief are not substantial enough to preclude effective appellate review; thus, we have elected to address the merits. ***Commonwealth v. Dupre***, 866 A.2d 1089 (Pa. Super. 2005).

In order to obtain collateral relief, a PCRA petitioner must establish by a preponderance of the evidence that his conviction or sentence resulted from one or more of the circumstances enumerated in 42 Pa.C.S.A.

§ 9543(a)(2). Instantly, Appellant asserted in his PCRA petition the existence of ineffective assistance of counsel pursuant to 42 Pa.C.S.A. § 9543(a)(2)(ii).

To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act. ***Rykard***, 55 A.3d 1177, 1189–1190 (Pa. Super. 2012). A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any one of these prongs. ***Commonwealth v. Martin***, 5 A.3d 177, 183 (Pa. 2010). We reiterate that counsel's representation is presumed to have been effective, unless the petitioner proves otherwise. ***Commonwealth v. Williams***, 732 A.2d 1167, 1177 (Pa. 1999). We have explained that trial 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*).

The precise nature of Appellant's first issue is difficult to ascertain. The issue, as stated in the PCRA petition and as addressed by the PCRA court, asserted ineffective assistance of counsel "for failure to challenge ***Miranda*** warning[s] based on [Appellant's] mental capacity." PCRA Petition, 1/2/12, at ¶ 7; PCRA Court Opinion, 2/8/13, at unnumbered 5. The PCRA court disposed of the issue as follows:

> [Appellant] argues that trial counsel was ineffective for failing to challenge the ***Miranda*** warnings based on his "mental capacity." Once again, [Appellant] has failed to plead and prove his case. No evidence has been presented of a lack of mental capability that would have hindered [Appellant's] ***Miranda*** warnings. Furthermore, testimony presented at the suppression hearing indicated [Appellant] came to the police station voluntarily and his admissions occurred during non-custodial questioning. . . . [Appellant] did not make any confessions subsequent to being read his rights. Therefore, [Appellant's] third claim is meritless.

PCRA Court Opinion, 2/8/13, at unnumbered 5.

Now, on appeal, Appellant is contending that when he was interviewed by Lancaster County Detective Michael Vance, he believed that he was not free to leave, he was in "custody," and warnings pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966), were required. The issue, as presented herein, was never presented to the trial court and, therefore, is waived. ***Rigg***, ___ A.3d at ___, 2014 PA Super 11 at *3.

Even if not waived, however, and in light of the trial court's fleeting reference to suppression hearing testimony that Appellant "came to the police station voluntarily and his admissions occurred during non-custodial questioning," we will address the issue in the alternative. PCRA Court Opinion, 2/8/13, at unnumbered 5. Examining the merits of the collateral claim, however, it is clear that Appellant's cognizable derivative ineffectiveness assertion fails.

Police detentions become custodial when, under the totality of the circumstances, the conditions or duration of the detention "become so

coercive as to constitute the functional equivalent of formal arrest." ***Commonwealth v. Baker***, 963 A.2d 495, 501 (Pa. Super. 2008). "The test focuses on whether the individual being interrogated reasonably believes his freedom of action is being restricted." ***Commonwealth v. Snyder***, 60 A.3d 165, 170 (Pa. Super. 2013). "The fact that the police may have 'focused' on the individual being questioned or that the interviewer believes the interviewee is a suspect is irrelevant . . . ." ***Commonwealth v. Page***, 965 A.2d 1212, 1218 (Pa. Super. 2009).

Testimony at the suppression hearing revealed that Appellant was not transported to the police station against his will; he went there voluntarily on May 9, 2009, where he met with Detective Vance at a prearranged time. N.T., 1/4/11, at 4, 31. The detective told Appellant that he was free to leave at any time. ***Id***. at 5. The door to the room where they met remained open at all times. ***Id***. Appellant was not handcuffed or otherwise restrained. The interview was not lengthy, lasting only one and one-half hours and including two breaks. ***Id***. at 7, 9. The detective never raised his voice. ***Id***. at 37. Appellant was given two breaks. ***Id***. at 7, 37. When Appellant admitted assaulting the child victim, he was given his ***Miranda*** warnings. ***Id***. at 11, 17.

Despite Appellant's self-serving statement that he told Detective Vance merely what he thought the officer wanted to hear and because he "was

afraid that [the officer] might have kept on asking me questions or he would arrest me anyway," Appellant's testimony at the suppression hearing is telling:

> Q. [By the prosecutor]: And you understood the question, did [the victim] suck your penis and your answer of yes?
>
> A [By Appellant]: Because I said that because that's what he wanted.
>
> Q. Did you come up with where this happened?
>
> A. Excuse me?
>
> Q. You said that you were telling him you were answering the questions with answers he wanted to hear. So how did you come up with it happened two times?
>
> A. Because I just answered because he kept on asking me. And he asked me, then later, did it happen more than twice, and my mind, I just said yes.
>
> Q. You said yes two times?
>
> A. Because that's what he wants to know. He wants to know.
>
> Q. So he asked you if it happened more than twice and you said it happened two times, right?
>
> A. Yes.
>
> Q. And you said that it happened in the summer of 2006, right?
>
> A. Yes.
>
> Q. And you said that her mom was at the fire company when this happened, right?
>
> A. I just said that to him.
>
> Q. But you said that?

A. Yeah.

Q. And you described where [the victim] was when she performed oral sex on you, right?

A. Yes.

Q. And you describe[d] that you had to jerk yourself off and that it got on her because she was in front of you, right?

A. Yes.

Q. And you described that they were about a week apart?

A. I just said that.

Q. And you said she was about 13 or 14 when this happened, right?

A. I really didn't know how old she was.

Q. But you said you thought she was 13 or 14, right?

A. Yes.

N.T., 1/4/11, at 36, 43–45.

Under the totality of the circumstances, Appellant's interview with police was not the functional equivalent of an arrest. He voluntarily went to the police station, he was free to leave at any time, the door to the interview room remained open, Appellant was not restrained, the interview was not lengthy, and the detective's tone of voice was as in normal conversation. ***See Baker***, 963 A.2d at 501 (under totality of the circumstances, police interview was not functional equivalent of arrest where the defendant agreed to meet with investigators, was free to leave, was not restrained, the interview lasted only one hour and forty minutes, and no threats were

made); ***Page***, 965 A.2d at 1218 (interview did not constitute custodial interrogation where the appellant's movement was not restricted; he was not placed in restraints, he was advised he could terminate the interview at any point, he was allowed breaks, and the three and one-half hour interview was not excessively long).

When Appellant admitted assaulting the child victim, he was given his ***Miranda*** rights. Thus, Appellant was not in custody thereby requiring the admission of ***Miranda*** warnings before he admitted assaulting the victim. ***Baker***, 963 A.2d at 501. As the underlying issue lacked arguable merit, counsel cannot be deemed ineffective for failing to raise a baseless claim. ***Commonwealth v. Hanible***, 30 A.3d 426 (Pa. 2011).

Appellant's second issue asserts that trial counsel was ineffective for failing to "investigate" Appellant's mental impairment prior to trial. Once again, the characterization of the issue in Appellant's brief varies from the issue asserted in the PCRA petition. The issue, as raised in the PCRA petition, stated: "Was trial counsel ineffective for failure to present evidence of [Appellant's] mental infirmity/sanity?" PCRA petition, 11/2/12, at ¶ 7. In disposing of this issue, the PCRA court stated the following:

> The claim is meritless. [Appellant] did not indicate in his petition what information trial counsel should have presented and how such information would have changed the outcome of his trial. It is clear that [Appellant] did not plead a claim of arguable merit and failed to prove how he was prejudiced. Additionally, at trial [Appellant] claimed he did not perform the acts he was accused

> of committing. [Appellant's] defense that he did not commit the crimes contradicts any claim that he was suffering from a mental infirmity or insanity at the time the acts occurred. Therefore, [Appellant's] first claim lacks merit.

PCRA Court Opinion, 2/8/13, at unnumbered 4–5.

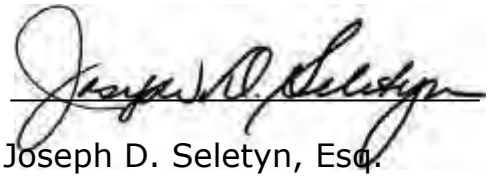
Appellant has now appended to his brief a neuropsychological report that was generated when Appellant was in high school, fifteen years before the occurrence of the instant crimes. The report concerned Appellant's learning disability and related Appellant's best opportunities for occupational success upon graduation. Appellant also appended a report of Appellant's intelligence testing when he was ten years old, a report of developmental functioning that was prepared when Appellant was in first grade, and a statement from an early childhood educator dated June 21, 1978, when Appellant was three years old, relating to Appellant's preschool functioning. All of the reports, which were not presented to the PCRA court, concerned Appellant's academic functioning.

As noted by the PCRA court, Appellant failed to indicate what evidence trial counsel could have proffered at trial and failed to suggest how the evidence would have changed the outcome of his case. Indeed, Appellant has failed to substantiate whether relevant evidence of Appellant's "mental infirmity" was even presented to trial counsel. Moreover, trial counsel obviously made a strategic decision to seek a verdict of not guilty, rather than pursue a mental infirmity defense, because Appellant took the stand at

trial and denied the charges. ***See Wood v. Allen***, ___ U.S. ___, 130 S.Ct. 841 (2010) (counsel's decision not to pursue or present mitigating evidence of defendant's mental deficiencies was reasonable result of strategic decision to focus on other defenses). Thus, we conclude that Appellant has failed to prove ineffectiveness. ***See Commonwealth v. Rega***, 933 A.2d 997 (Pa. 2007) (ineffectiveness not shown where petitioner failed to prove strategy employed by trial counsel was so unreasonable that no competent lawyer would have chosen that course of conduct).

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/27/2014