

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellee		
v.		
ANTHONY SOLOMAN,		
Appellant		No. 615 WDA 2013

Appeal from the Order entered March 25, 2013,
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0017446-2006.

BEFORE: BOWES, ALLEN, and LAZARUS, J.:

MEMORANDUM BY ALLEN, J.:

FILED DECEMBER 03, 2013

Anthony Soloman, a/k/a/ Anthony Solomon ("Appellant"), appeals from the order denying his first petition filed pursuant to the Post Conviction Relief Act. 42 Pa.C.S.A. §§ 9541-9546. We affirm.

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

On November 9, 2006, the victim, Mark Gibson, was attacked by two men. Gibson stated that the two men, one of whom he identified as Appellant, got out of a car and beat him up. Gibson was punched and kicked over numerous areas of his body. He testified that Appellant beat him in the back of the head. Gibson did not see either individual strike him, as he spent the entire encounter attempting to cover his face. Gibson said that only two individuals were close enough to him to have struck him, Appellant and the other assailant, later identified as Thomas Gruhle. Gibson stated that he could see Gruhle when he was being struck and thus concluded that Gruhle had not struck him.

Immediately after the incident, Gibson's head was bleeding. Gibson went to the hospital that night. [Collectively, Appellant's medical records were admitted by stipulation. Included was an "Attestation Report" from Allegheny General Hospital which contained the diagnoses of skull fracture and concussion.] He experienced dizziness and headaches. As a result, he was kept overnight for observation. Eight days later, Gibson sought medical treatment again because his symptoms persisted. Moreover, Gibson testified that as a result of this incident, he has lost both his sense of smell and his sense of taste.

On July 29, 2009, after a nonjury trial, [Appellant] was found guilty of Aggravated Assault. Appellant was sentenced to a term of imprisonment of eight to one hundred sixty months, with a consecutive term of probation of thirty-six months. Appellant was also ordered to make restitution in the amount of \$17,547.33. On November 4, 2009, Appellant filed a Notice of Appeal to the Superior Court. Judgment of sentence was affirmed on January 25, 2011.

On December 21, 2011, Appellant filed a *pro se* [PCRA] petition [and the PCRA court appointed counsel, who filed an amended petition]. Three claims were presented in the amended PCRA [p]etition: 1) the verdict was against the weight of the evidence, and trial counsel was ineffective in not raising this issue properly under Pa.R.Crim.P. 607[;] 2) Appellant is entitled to have his right to appeal to the Pennsylvania Supreme Court from his Superior Court decision reinstated based on counsel's ineffectiveness, and 3) the imposition of the sentence of restitution is illegal because the court awarded restitution in a speculative amount not supported by the record.

On August 13, 2012, this Court reinstated Appellant's right to petition the Supreme Court of Pennsylvania for review, but denied Appellant's first and third claims. [The PCRA court] granted a stay as to the denial of the first and third claims pending the outcome of the [petition for allowance of appeal]. On March 21, 2013, Appellant's [petition for allowance of appeal] was denied by the

Supreme Court of Pennsylvania. On March 25, 2013 Appellant's PCRA petition was dismissed without a hearing.

See PCRA Court Opinion, 6/28/13, at 2-4 (citations and footnote omitted).

This timely appeal followed. Both Appellant and the PCRA court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues:

I. DID THE [PCRA] COURT ERR WHEN IT DENIED, WITHOUT A HEARING, THE PCRA ISSUE THAT THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE, AND THAT TRIAL COUNSEL WAS INEFFECTIVE IN NOT RAISING THIS ISSUE PROPERLY UNDER PA.R.CRIM.P. 607?

II. DID THE [PCRA] ERR IN NOT GRANTING PCRA RELIEF WHEN THE IMPOSITION OF THE SENTENCE OF RESTITUTION WAS ILLEGAL WHERE THE COURT AWARDED RESTITUTION NOT SUPPORTED BY THE RECORD?

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.** 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 first claims that trial counsel was ineffective for failing to preserve a challenge to the weight of the evidence supporting his convictions. Our Supreme Court has summarized:

An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict

in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he [or she] were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Commonwealth v. Widmer, 560 Pa. 308, 319-20, 744 A.2d 745, 751-52 (2000) (quotations, citations and footnote omitted). Stated differently, a new trial based upon a claim that the guilty verdict was against the weight of the evidence “should be awarded when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.” ***Commonwealth v. Ross***, 856 A.2d 93, 99 (Pa. Super. 2004) (citations omitted). “In this regard, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.” ***Id.***

A weight challenge must be raised orally or in writing before the trial court pursuant to Pa.R.Crim.P. 607. Appellant concedes that no such motion was made by trial counsel. Of course, before counsel can be found ineffective for failing to preserve the claim, the underlying challenge to the weight of the evidence must have merit. The PCRA court concluded that it did not:

Appellant alleges that a weight of the evidence claim has arguable merit because Gibson’s testimony “was

unreliable as he did not witness who was hitting him and was only speculation that led to the belief that Appellant was the attacker." (Amended Petition at 6).

In this case Gibson was the only witness and the [PCRA court, which also presided as the trial court,] sat as finder of fact. Therefore, [the trial court] determined whether the Commonwealth had met its burden and if sufficient evidence had been produced by evaluating Gibson's credibility. Necessarily, the "weight of the evidence" inquiry was subsumed into the "sufficiency of the evidence" inquiry -- which not only was essential for the rendition of the verdict, but which was revisited by [the trial court] when it prepared an Opinion in response to the sufficiency of the evidence challenge raised on direct appeal:

[Appellant] alleges that the Commonwealth failed to establish identification beyond a reasonable doubt. [Gibson], however, did state that [Appellant] was present during his attack and that [Appellant] and the other assailant were the only two individuals close enough to him to be capable of reaching him. [Gibson] also stated he could conclude [Appellant] was his attacker as the other individual close enough to strike him was within his view when he was hit from behind. As no one else was within close physical proximity to assault [Appellant], it was permissible for [the trial court] to infer that [Appellant] was sufficiently identified by the victim.

(Trial Court Opinion, 5/6/10, at 4). Because the [trial court] found Gibson credible in the first instance, a weight of the evidence challenge would not have succeeded if presented in post-sentence motions.

Further, since the inquiry on appeal in a weight challenge focuses on the [trial court's] exercise of discretion, and because it has been held that one of the least assailable reasons for granting a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence, a weight of evidence challenge would have been frivolous. The [PCRA court]

finds that trial counsel was not ineffective for failing to present this challenge on appeal.

PCRA Court Opinion, 6/28/13, at 5-6 (citations omitted).

Our review of the transcript of Appellant's non-jury trial supports the PCRA court's conclusion that a post-sentence challenge to the weight of the evidence would be meritless. Within his brief, Appellant reiterates his allegation that Gibson's testimony "was unreliable as he did not witness who was hitting him and [it] was only speculation which led to his belief that [Appellant] was the attacker." Appellant's Brief at 8. Because Gibson testified that he could see Mr. Gruhle while Gibson was being kicked in the head, it was reasonable for the trial court to conclude that Appellant was the perpetrator of the assault. We affirmed the trial court's conclusion on direct appeal. **See Commonwealth v. Soloman**, 23 A.3d 1093 (Pa. Super. 2011), unpublished memorandum at 5-6 (stating that "Appellant did, however, see the other man involved in the assault, Thomas Gruhle, standing off to the side as the kicks were delivered. The only logical conclusion from this observation, therefore, was that Appellant was the assailant who repeatedly kicked [Gibson] as he lay on the ground."). Thus, because trial counsel cannot be deemed ineffective for failing to pursue a meritless claim, **Loner, supra**, Appellant's claim of ineffectiveness fails.

In his second issue, Appellant asserts that the restitution amount ordered by the trial court as part of his sentence is "illegal, arbitrary and unsupported by the record." Appellant's Brief at 8. According to Appellant,

the trial court ordered restitution in a speculative amount, without documentation submitted on the record to establish the amount of restitution owed." ***Id.***

"[Q]uestions regarding the [trial] court's authority with respect to restitution implicate the legality of a sentence." ***Commonwealth v. Burwell***, 42 A.3d 1077, 1084 (Pa. Super. 2012). Our review of the record refutes Appellant's claim, and supports the following explanation by the PCRA court:

At the sentencing proceeding, the Commonwealth stated that Gibson "did have \$17,547.33 in medical bills as a result of his injuries he sustained during this incident. He did not have insurance at the time. The Commonwealth would request restitution in that amount." [N.T., 10/8/09, at 7.] Gibson's medical records from Ali-Kiski Medical Center from November 9, 2006 were entered into evidence at trial by stipulation. [N.T., 7/20/09, at 31-32.] Appellant's stipulation to the admission of medical records which indicate specifically the amount of medical bills Gibson sustained and lack of objection at sentencing serve as both a waiver of the issue and competent evidence upon which [the trial court] could rely to award restitution with specificity. As such, the record is sufficient to support the order of restitution in this case.

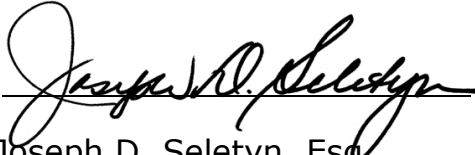
PCRA Court Opinion, 6/28/13, at 7.

In sum, Appellant's ineffectiveness claim lacks merit and the record supports the trial court's restitution order. We therefore affirm the PCRA court's order denying Appellant's PCRA petition.

Order affirmed.

J-S69023-13

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: 12/3/2013