

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MELVIN LEWIS CLARK,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 673 EDA 2012

Appeal from the PCRA Order February 21, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0000691-2005

BEFORE: STEVENS, P.J., BOWES, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.:

FILED MAY 20, 2013

Melvin Lewis Clark appeals the order entered on February 21, 2012, wherein the trial court denied his first petition for post-conviction relief.¹ We affirm.

During the direct appeal, we reiterated the underlying facts as follows:

On September 5, 2004, the victim, Steven Kearse, was shot in the back as he fled in a hail of bullets from Appellant and two

* Former Justice specially assigned to the Superior Court.

¹ Although the PCRA court previously granted Appellant post-conviction relief in the form of the right to file a petition for allowance of appeal *nunc pro tunc*, we treat the instant petition as his first PCRA petition. **See Commonwealth v. Lewis**, 718 A.2d 1262, 1263 (Pa.Super. 1998) (When petitioner is granted appeal *nunc pro tunc* in first PCRA petition, subsequent PCRA petition would be considered first PCRA petition for timeliness purposes).

companions. The shooting was apparently in retaliation for the victim's own unsuccessful attempt earlier that evening to kill one of his eventual slayers, Christopher Waller, who had failed to pay a drug debt. These events occurred in Norristown, Montgomery County; various co-defendants and witnesses resided in Phoenixville, King of Prussia, and Eagleville, also located in Montgomery County.

Commonwealth v. Clark, 928 A.2d 1120 (Pa.Super. 2007) (unpublished memorandum at 1), *appeal denied*, 14 A.3d 823 (Pa. 2010). The PCRA court, which presided over the jury trial, further summarized the relevant aspects of the Commonwealth's evidence that established Appellant as one of the three assailants who shot Mr. Kears:

Christopher Waller and [his co-hort] Darius Andrews testified directly—corroborated by cellular phone records—that [Appellant] was involved in the crime. The victim's girlfriend—who witnessed the shooting—testified (N.T., January 10, 2006, pp. 44-59) that, although she was unable to identify the shooters, *three* men had committed the crime. A nearby resident testified (N.T., January 10, 2006, pp. 78-84) that he heard the gunshots, looked out his window, and saw *three* men running from the scene. Because it was dark outside, this witness was unable to identify the men, . . . [but] testified that, while he initially saw *three* men running by, he then saw "one person running back- as far as I could understand, it was sort of like a hesitation- and then, again, running away from Marshall Street[.]"

Trial Court Opinion, 3/28/12, at 9 (emphasis in original).

On January 19, 2006, a jury convicted Appellant of third degree murder and carrying a firearm without a license. On May 18, 2006, the trial court imposed an aggregate term of twenty to forty-four years imprisonment. We affirmed the judgment of sentence on April 12, 2007,

and following *nunc pro tunc* relief, our Supreme Court denied allowance of appeal on December 29, 2010. ***Id.***

On September 27, 2011, Appellant timely filed the instant, counseled PCRA petition, wherein he asserted that trial counsel provide ineffective assistance in failing to present testimony of Winfred Johnson, a purported witness, who did not observe Appellant at the crime scene on the day in question or see Appellant flee with the other two assailants. He further contended that Mr. Johnson knew the victim and two assailants. Appellant continued that even though his defense counsel was not aware of Mr. Johnson or his willingness to cooperate, a reasonable investigation by trial counsel would have uncovered the witness. However, and significant to our resolution of this appeal, the memorandum of law that Appellant submitted to the PCRA court in support of his petition did not address the allegations that he actually raised in his PCRA petition. Instead of asserting the merits of his claim that trial counsel provided ineffective assistance for failing to present Mr. Johnson's testimony, Appellant argued the undisputed point of law that our Supreme Court's holding in ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002) precluded him from asserting his allegations on direct appeal. This argument is especially peculiar as Appellant's entitlement to challenge trial counsel's effectiveness during the post-conviction proceeding was never an issue in this case.

On December 2, 2011, the PCRA court entered an order providing notice pursuant to Pa.R.Crim.P. 907 of its intention to dismiss the petition without a hearing. In the Rule 907 notice, the PCRA court observed that Appellant had failed to attach any supporting documentation to his PCRA petition pursuant to Pa.Crim.P. 902(D) or include a signed certification outlining Mr. Johnson's proposed testimony during the PCRA hearing. Appellant's written response to the court's Rule 907 notice incorporated an affidavit/certification executed by Mr. Johnson, wherein the putative witness reasserted the facts alleged in Appellant's petition. After the Commonwealth filed a reply, the PCRA court formally dismissed Appellant's PCRA petition without a hearing. This timely appeal followed.² Appellant complied with the PCRA court's directive to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), wherein he preserved two issues for our review, which he reiterates on appeal as follows:

I. Did the PCRA Court err by improperly dismissing Appellant's claim that trial counsel was ineffective for failing to call defense witness Winfred Johnson?

II. Did the PCRA Court err by improperly dismissing Appellant's claim that trial counsel was ineffective for failing to properly prepare for trial and conduct a proper investigation prior to trial?

Appellant's brief at 4.

² We observe that while Appellant purported to appeal his 2006 convictions and judgment of sentence, the instant appeal properly lies from the order dismissing his PCRA petition.

We review a PCRA court's order to determine whether it is supported by the evidence of record and free of legal error. **See Commonwealth v. Ford**, 44 A.3d 1190, 1194 (Pa.Super. 2012). In **Ford** we explained:

We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. **Commonwealth v. Burkett**, 5 A.3d 1260, 1267 (Pa.Super. 2010). This review is limited to the findings of the PCRA court and the evidence of record. **Id.** We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. **Id.** This Court may affirm a PCRA court's decision on any grounds if the record supports it. **Id.** We grant great deference to the factual findings of the PCRA court and will not disturb those findings unless they have no support in the record. **Commonwealth v. Carter**, 21 A.3d 680, 682 (Pa.Super. 2011). However, we afford no such deference to its legal conclusions. **Commonwealth v. Paddy**, 609 Pa. 272, 15 A.3d 431, 442 (2011); **Commonwealth v. Reaves**, 592 Pa. 134, 923 A.2d 1119, 1124 (2007). Further, where the petitioner raises questions of law, our standard of review is *de novo* and our scope of review is plenary. **Commonwealth v. Colavita**, 606 Pa. 1, 993 A.2d 874, 886 (2010).

Id. at 1194.

In addition, we observe that “[W]here a PCRA petition does not raise a genuine issue of material fact, the reviewing court is not required to hold an evidentiary hearing on the petition. Thus, to entitle himself to a hearing, an appellant must raise an issue of fact, which, if resolved in his favor, would justify relief.” **Commonwealth v. Simpson**, 2013 WL 1200248 *3 (Pa. 2013) (internal quotation marks and citations omitted).

As it relates to Appellant's ineffective assistance of counsel claims, our Supreme Court recently reiterated the relevant legal precepts:

To establish counsel's ineffectiveness, a PCRA petitioner must demonstrate: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action chosen; and (3) counsel's action or inaction prejudiced the petitioner. **See Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Commonwealth v. Pierce**, 515 Pa. 153, 527 A.2d 973, 975 (1987).

Commonwealth v. Abraham, 62 A.3d 343, 346 n.5 (Pa. 2012).

Herein, the argument that Appellant presents in his brief is not responsive to the two issues that he preserved in the Rule 1925(b) statement and leveled in the questions presented on appeal. Indeed, the argument section of his appellate brief appears to be a restyled submission of the inapt argument he originally presented in the memorandum in support of his PCRA petition. Neither submission confronted the actual issue involved in this case, *i.e.*, trial counsel's ineffectiveness. In short, as the Commonwealth accurately observes, Appellant failed to develop any legal argument in his brief to support the allegations of trial counsel's ineffectiveness for failing to conduct a proper pretrial investigation and call Mr. Johnson as a defense witness.³ Appellant continued to argue that he

³ Appellant's entire argument relating to the merits of the issues he raised and preserved in this matter is as follows:

Defendant's PCRA ineffective assistance of counsel claims . . . concern trial counsel's failure: to call witnesses that were indispensable to the litigation; to discover and subsequently interview witnesses that were indispensable to the litigation; [and] to request evidence that would strongly suggest the innocence of the Defendant. . . .

(Footnote Continued Next Page)

could not have asserted his ineffective assistance claims during the direct appeal. Again, we highlight that while this legal position is accurate, it is irrelevant to the merits of this appeal insofar as neither the PCRA court nor the Commonwealth has ever disputed Appellant's ability to challenge his trial counsel's stewardship in the underlying post-conviction petition. As Appellant failed to present any meaningful argument with citation to relevant legal authority, his undeveloped assertions of trial counsel's ineffectiveness are waived. **See Commonwealth v. Thoeun Tha**, 2013 WL 1313091 *7 (Pa.Super. 2013) ("Failure to present or develop an argument in support of a claim causes it to be waived."); Pa.R.A.P. 2119(a).

Moreover, even if we were to address the merits of the position Appellant raised in his petition but abandoned on appeal, we would find the claims meritless. In order to establish ineffective assistance of trial counsel based upon the failure to present a witness, Appellant was required to demonstrate: "(1) the witness existed; (2) counsel was either aware of or should have been aware of the witness' existence; (3) the witness was willing and able to cooperate with the defense; and (4) the defendant was prejudiced by the absence of the witness' testimony." **Simpson, supra** at (Footnote Continued) _____

Appellant's brief at 8-9. After setting forth these claims, however, Appellant failed to argue the merits of any of these contentions. Instead, he concludes: "Because Defendant did not have a right to bring ineffective assistance of counsel claims on direct appeal, he is entitled to do so via the PCRA Petition." **Id.** at 9.

*13. Moreover, as we noted *supra*, to be entitled to an evidentiary hearing, Appellant was required to assert material facts, “which, if resolved in his favor, would justify relief.” *Id.* at *3 (Pa. 2013). Herein, Appellant failed to establish any material questions of fact.

Neither Appellant’s PCRA petition nor his response to the PCRA court’s 907 notice, the two filings that actually address the relevant subject, raises an issue of material fact regarding whether trial counsel was aware or should have been aware of Mr. Johnson. In fact, the record demonstrates that Mr. Johnson and Appellant are not acquainted and never met. Moreover, Appellant failed to assert that trial counsel had any knowledge of Mr. Johnson’s existence, much less the fact that he claimed to have observed the assailants’ flight after the shootout. Appellant simply levels the bare assertion that a reasonable investigation would have identified Mr. Johnson as a witness to the crime. However, that assertion alone is insufficient. Indeed, Appellant does not aver, and Mr. Johnson never asserted, that Mr. Johnson informed **anyone**, including the investigating authorities, that he witnessed any part of the crime. Thus, absent some suggestion that an unidentified witness actually existed, trial counsel had no reason to attempt to discover an undisclosed and unknown potential witnesses. Furthermore, there is no indication that an investigation would have revealed Mr. Johnson. We observe that, even while challenging trial counsel’s stewardship for failing to uncover Mr. Johnson as a potential

witness, Appellant neglects to explain why neither he nor appellate counsel became aware of the putative witness's existence until Mr. Johnson serendipitously established direct contact with Appellant's current lawyer. Accordingly, we find that the record sustains the PCRA court's determination that, even assuming the veracity of Mr. Johnson's proposed testimony, Appellant failed to raise a material issue of fact regarding trial counsel's failure to ascertain the would-be witness's existence that would have necessitated an evidentiary hearing.

Similarly, Appellant's averments do not raise a material question of fact regarding prejudice. In pertinent part, Mr. Johnson's certified statement provided as follows:

I Winifred Johnson was walking from the store on Tremont and Moore St[.] in Norristown, PA 19403. When I heard shots fired[,] I looked back and saw two males running toward me and made a right on Tremont. I was walking on the [600] block of Moore St[.] during the shooting and the shots were fired on the seven hundred block of Moore St. I saw Smoke [(Andrews)] and Brick [(Waller)] running from the [700] block of Moore St. with guns in their hands going towards the Park.

I lived in Norristown, PA. for 20 years[.] I am very familiar with Smoke and Brick . . . and I know both on sight.

I saw them after the shots were fired running from the scene with guns drawn after ([F]aheim) (Steven) was shot.

. . . .

I was on the block of Moore St[.] for several hours and I am sure that [Appellant] wasn't on Moore St[.] at all that day.

If need[ed,] I am willing to testify at any hearing and I've been offered nothing in return for my help.

Affidavit/Certification, 1/10/12, at 1-2.

In dismissing Appellant's petition without a hearing, the PCRA court reasoned that while the proposed testimony would identify two of the assailants who fled the scene, it would not preclude the finding that Appellant participated in the murder. As the PCRA court explained, the proposed testimony "would establish only that Mr. Johnson did not see [Appellant] running away from the scene. Mr. Johnson does not even claim to have witnessed the actual shooting, which took place at night, in full darkness." Trial Court Opinion, 3/28/12, at 8-9. We agree with the PCRA court's rationale. As Mr. Johnson never witnessed the shooting, his testimony is limited to his observations of two assailants' flight.

Similarly, the proposed testimony that Mr. Johnson did not observe Appellant during the period that Mr. Johnson was "on the block" does not raise a material issue of fact regarding whether Appellant was on Moore Street when the shooting occurred. Affidavit/Certification, 1/10/12, at 2. First, we observe that since Mr. Johnson is not acquainted with Appellant, it is unlikely that he could determine whether Appellant was ever on the street. Second, and more importantly, while Mr. Johnson attests to being on the block for several hours, he indicated that he was not present when the shooting occurred, and therefore, he is not competent to testify that he is certain that Appellant was not on the street all day.

Moreover, the entirety of Mr. Johnson's proposed testimony does not raise a material issue of fact in light of the full weight of evidence the Commonwealth adduced during the jury trial to establish that Appellant was among the three assailants who shot the victim in his back. As noted, two witnesses with corroborating cellular telephone records testified that Appellant participated in the crime. While two other witnesses could not identify Appellant specifically, they both verified that three, rather than two, assailants were involved in the shooting. Furthermore, one of the witnesses explained that the three attackers did not flee the scene together, which would explain Mr. Johnson's perspective that he observed only two individuals from his vantage point. Thus, no relief is due.

In sum, Appellant failed to raise an issue of material fact regarding his presence at the crime scene during the shooting, which, if resolved in his favor, would justify relief. Accordingly, the PCRA court did not err in dismissing Appellant's petition without an evidentiary hearing.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Kevin Gambetti", written over a horizontal line.

Prothonotary

Date: 5/20/2013