

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

CHARLES PHILLIP PAYNE A/K/A
CHRISTOPHER PAYNE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 718 WDA 2012

Appeal from the PCRA Order April 2, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0011688-2005

BEFORE: GANTMAN, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, J.:

FILED: May 17, 2013

Appellant, Charles Phillip Payne a/k/a Christopher Payne, appeals from the order entered in the Allegheny County Court of Common Pleas, denying his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm.

This Court previously set forth the facts of this case as follows:

On June 28, 2005, at approximately 10:30 p.m., Michael Rumble had just dropped off his girlfriend, Charlene Weaver, at her apartment in the Monview Heights Housing Project in West Mifflin, Pennsylvania. Rumble was in the front passenger seat of the car being driven by his friend, Aaron Shealey since Rumble was on crutches from recent knee surgery. As they proceeded down Midway Drive,

¹ 42 Pa.C.S.A. §§ 9541-9546.

*Former Justice specially assigned to the Superior Court.

Rumble noticed three men standing by a dumpster and saw [Appellant] holding a gun near the head of the victim, Jhirmon Whitaker. He then saw a flash from the gun and saw Whitaker fall to the ground. Rumble sunk down in his seat and told Shealey to speed up and to get out of the area. Before leaving the area, however, they looped around the housing project to go tell Rumble's girlfriend to go inside her house because he had just witnessed a shooting.

Shealey and Rumble went back to Rumble's house and Rumble talked with his mother, told her about the shooting and she convinced him to contact the police. Approximately fifteen minutes after he arrived home, he called 911 and advised them that there had been a shooting on Midway Drive in the Monview Heights Projects and that he had witnessed the shooting. Rumble subsequently was interviewed by Homicide Detectives of the Allegheny County Police and told the police what he had seen. He identified [Appellant] as the shooter, indicating that he saw a gun in [Appellant's] hand and he saw [Appellant] fire that weapon. He told the police that he had known [Appellant] most of his life and, in fact, [Appellant] at one point in time lived across the street from him. He would see [Appellant] on a regular basis and he was positive in his identification. When he was shown a photo array, he immediately identified [Appellant] as Whitaker's killer. Rumble agreed to have his statement taped and that was done. Rumble was the Commonwealth's key witness in identifying [Appellant] as Whitaker's killer, since Shealey was driving the car and could only testify that he saw three men standing by the dumpster and as he drove by he heard gunshots, but he did not see who did the shooting or who was shot.

As trial approached, Rumble became a reluctant and recalcitrant witness. Initially, he maintained that he would not answer any questions and asserted a supposed Fifth Amendment privilege. When [the] [c]ourt advised him that he had no such privilege, he indicated that he still was not going to testify. Rumble was held in contempt for his refusal to testify and lodged in the Allegheny County Jail. While in the jail, he was told to watch his back and remember what happens to snitches. Rumble was put in

the Witness Protection Program and eventually agreed to testify against [Appellant], however, his trial testimony differed with respect to the taped statement that he gave to the police shortly after this homicide, in that he suggested that there was a second gun that was involved. [Appellant] took the stand in his own defense and presented alibi testimony which was supposedly supported by his uncle. [Appellant] maintained that at the time that this shooting occurred, he was drinking in Aces & Deuces Bar and while he had been on Midway Avenue earlier in the evening, he was not there at the time that Whitaker was shot.

Commonwealth v. Payne, 996 A.2d 13 (Pa.Super. 2010), *appeal denied*, 606 Pa. 694, 998 A.2d 960 (2010). A jury convicted Appellant of first degree murder and firearms offenses. The court sentenced Appellant to life imprisonment for murder, with a consecutive sentence of five to ten years' imprisonment for the firearms convictions. This Court affirmed the judgment of sentence on direct appeal; our Supreme Court denied review on July 21, 2010. ***See id.***

On October 25, 2010, Appellant filed a *pro se* PCRA petition. The court appointed counsel, who filed an amended petition. After holding a hearing, the court denied Appellant's petition on April 2, 2012. On April 30, 2012, Appellant timely filed a notice of appeal. The court ordered Appellant to file a concise statement of errors complained on appeal pursuant to Pa.R.A.P. 1925(b); Appellant timely complied.

Appellant raises one issue for our review:

WHETHER TRIAL COUNSEL GAVE INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO THE DEFECTIVE ALIBI INSTRUCTION?

(Appellant's Brief at 4).

Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007).

Appellant argues trial counsel was ineffective for failing to object to a defective jury instruction on alibi. According to Appellant, the court's alibi instruction deviated from Pennsylvania Standard Criminal Jury Instruction 3.11 because it did not inform the jury that the Commonwealth carried the burden to disprove Appellant's alibi defense. Instead, Appellant claims the language of the court's instruction improperly suggested Appellant was required to prove his alibi defense and likely left the jury misinformed about the proper burden of proof for alibi. Appellant contends counsel should have objected to the misleading instruction and had no reasonable basis to believe the instruction was a correct statement of the law. If the jury had received a proper alibi charge, Appellant concludes there is a reasonable likelihood the outcome of his trial would have been different. We disagree.

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on having produced a just result.” **Strickland v. Washington**, 466 U.S. 668, 669, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, ____ (1984). When asserting a claim of ineffective assistance of counsel, the petitioner is required to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and (3) but for the errors and omission of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. **Commonwealth v. Kimball**, 555 Pa. 299, 724 A.2d 326 (1999). Counsel is presumed effective, and the failure to satisfy any prong of the ineffectiveness test will cause the claim to fail. **Commonwealth v. Williams**, 597 Pa. 109, 950 A.2d 294 (2008).

“The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit...” **Commonwealth v. Pierce**, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994). “Once this threshold is met we apply the ‘reasonable basis’ test to determine whether counsel’s chosen course was designed to effectuate his client’s interests.” **Id.** at 524, 645 A.2d at 194-95. If there is no reasonable basis for counsel’s action, we must move to the final point of analysis under **Strickland/Pierce**—prejudice. **Kimball, supra**. A defendant raising an

ineffectiveness claim is required to show counsel's ineffectiveness was of such magnitude that it "could have reasonably had an adverse effect on the outcome of the proceedings." **Pierce, supra** at 162, 527 A.2d at 977. In other words, there must be a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different. **Commonwealth v. Cox**, 581, Pa. 107, 125, 863 A.2d 536, 546 (2004). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Commonwealth v. Chambers**, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002).

A trial court has broad discretion in how its jury instructions are phrased. **Commonwealth v. Kerrigan**, 920 A.2d 190, 198 (Pa.Super. 2007). It may choose its own wording as long as the law is clearly, adequately and accurately presented. **Id.** In assessing a challenge to jury instructions, the instruction must be viewed as a whole. **Commonwealth v. Jones**, 858 A.2d 1198, 1201 (Pa.Super. 2004). The general effect of the charge controls, and courts will not scrutinize isolated excerpts out of context. **Id.** Reversible error occurs only where the court provides an inaccurate statement of the law. **Kerrigan, supra** at 198.

An alibi is "a defense that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." **Commonwealth v. Rainey**, 593 Pa. 67, 98, 928 A.2d 215, 234 (2007) (internal citations

omitted). In reviewing the adequacy of alibi instructions, our Supreme Court has rejected a “magic words” approach. **Commonwealth v. Saunders**, 529 Pa. 140, 147, 602 A.2d 816, 819 (1992). An alibi instruction is proper so long as it informs the jury that the alibi evidence, either by itself or together with other evidence, could raise a reasonable doubt about the defendant’s guilt and directs the jury to consider the alibi evidence in determining whether the Commonwealth met its burden in proving beyond a reasonable doubt that the defendant committed the crime at issue. **Id.** at 145, 602 A.2d at 818. A jury charge satisfying this standard should not be interpreted as meaning that the defendant assumed some burden of proof by offering an alibi defense. **Id.**

In the present case, the court gave the following instruction on alibi:

Now, the defendant has presented testimony that he was not at the scene of the crime when this homicide was committed. In fact, that he was with his uncle at Aces & Deuces’ Lounge. You should consider all this evidence, in conjunction with the other evidence given to you, in making a determination as to whether or not the defendant committed the crime for which he or she is charged. The alibi testimony would be such that if it is believed by you would be sufficient to demonstrate that the defendant did not commit this crime.

(N.T. Trial, 11/1/06, at 502-03.) In other portions of the court’s charge, it instructed the jury on the Commonwealth’s burden of proof:

As I told you in my preliminary remarks, the fundamental principal of our criminal justice system is any individual accused of a crime is presumed innocent. That presumption of innocence rests with [Appellant] throughout the course of this trial and now will go out with

you during your deliberations. That presumption of innocence can be overcome if and only if you are individually and collectively convinced that the Commonwealth has met its burden of proving each and every element of the offenses charged beyond a reasonable doubt.

Id. at 494. Read together, the court's instructions fully and clearly conveyed that Appellant's alibi evidence could raise a reasonable doubt about his guilt and the jury should consider the alibi evidence when returning its verdict. This was a correct statement of the law. **See Commonwealth v. Ragan**, 560 Pa. 106, 124, 743 A.2d 390, 399 (1999) (approving jury charge that informed jury that alibi defense could raise reasonable doubt as to defendant's guilt and be sufficient to justify acquittal; referencing substance of court's instruction as capturing "the legal principal of an alibi defense"). The charge adequately expressed the essentials of an alibi defense, informing the jury that reasonable doubt could arise based on Appellant's claim that he was elsewhere at the time of the murder. The jury charge in this case was not identical to Pennsylvania Standard Criminal Jury Instruction 3.11, but it did not have to be. **See Saunders, supra** at 147, 602 A.2d at 819 (reiterating principle that courts should review jury charge in totality, rejecting "magic words" approach to jury instructions). Here, the court's instruction was substantially similar to the standard alibi instruction and presented the jury with a common-sense understanding of the defense. **Compare** (N.T. Trial at 502-03) (stating: "You should consider all this evidence, in conjunction with the other evidence given to you, in making a

determination as to whether or not the defendant committed the crime for which he or she is charged. The alibi testimony would be such that if it is believed by you would be sufficient to demonstrate that the defendant did not commit this crime.”), with Pennsylvania Standard Criminal Jury Instruction 3.11 (stating: “You should consider this evidence along with all other evidence in this case in determining whether the Commonwealth has met its burden of proving beyond a reasonable doubt that a crime was committed and that defendant himself committed...it. The defendant’s evidence that he was not present, either by itself or together with other evidence, may be sufficient to raise a reasonable doubt of guilt in your minds. If you have a reasonable doubt of the defendant’s guilt, you must acquit him.”)

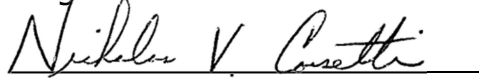
To the extent Appellant contends the court’s use of the language “if believed by you” in its alibi charge somehow suggested to the jury that Appellant had an affirmative burden to prove his alibi defense, his claim is misguided. Appellant’s position here takes an overly narrow view of the court’s alibi instruction. Specifically, Appellant fails to account for other portions of the court’s jury charge, where the court unequivocally expressed the Commonwealth’s burden of proof and Appellant’s presumption of innocence. Because the entirety of the court’s jury instructions correctly informed the jury about the nature of an alibi, counsel had no basis to object. The court properly concluded Appellant’s ineffective assistance claim

J-S23008-13

lacked arguable merit on the ground asserted. Accordingly, we affirm the order denying PCRA relief.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: May 17, 2013