

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

JOEL CARRILLO

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 721 EDA 2012

Appeal from the PCRA Order September 4, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0103741-2002;
CP-51-CR-1203201-2001; CP-51-CR-1203331-2001

BEFORE: STEVENS, P.J., GANTMAN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, J.:

Filed: January 24, 2013

Appellant, Joel Carrillo, appeals from the order entered in the Philadelphia County Court of Common Pleas, dismissing his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm.

The relevant facts and procedural history of this appeal are as follows.

The record reveals that Appellant's convictions stem from the September 22, 2001 shooting of Brian Hill. At approximately 8:19 p.m. on September 22, 2001, on the crowded street corner of Allegheny Avenue and Reach Street, Appellant drew an automatic, 9mm handgun and fired eighteen shots at Mr. Hill, emptying the clip of his gun. Mr. Hill was hit with ten of the bullets and one of the remaining bullets struck an elderly woman passing through the neighborhood. Two of the eyewitnesses, Ms. Lawson and Ms. Miller, who knew Appellant from the

¹ 42 Pa.C.S.A. §§ 9541-9546.

neighborhood, positively identified him to police and picked him out from separate photo arrays.

On September 24, 2003, Appellant waived his right to a jury...and proceeded to trial... On September 29, 2003, the trial court found Appellant guilty of murder in the third degree, aggravated assault, [recklessly endangering another person], [a violation of the Uniform Firearms Act], and [possessing an instrument of crime]. He was sentenced to an aggregate term of twenty to forty years of incarceration.

Commonwealth v. Carrillo, No. 3739 EDA 2003, unpublished memorandum at 2-3 (Pa.Super. filed December 6, 2004) (internal citations to the record omitted). This Court affirmed the judgment of sentence on December 6, 2004, and our Supreme Court denied Appellant's petition for allowance of appeal on April 15, 2005.

Appellant timely filed a *pro se* PCRA petition on August 30, 2005. The court appointed counsel, who filed a "no-merit" letter pursuant to ***Turner/Finley***² on June 1, 2007. That same day, the court issued notice of its intent to dismiss the petition without a hearing, pursuant to Pa.R.Crim.P. 907. Appellant filed a *pro se* response to the court's Rule 907 notice on June 22, 2007. The case remained dormant until July 16, 2009, when the court re-issued Rule 907 notice. Appellant did not respond to the re-issued Rule 907 notice. On September 4, 2009, the court denied PCRA relief and

² ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa.Super. 1988) (*en banc*).

permitted PCRA counsel to withdraw. Appellant did not file a notice of appeal.

On May 24, 2010, Appellant filed a *pro se* PCRA petition, claiming he did not receive timely notice of the September 4, 2009 order denying PCRA relief. On January 27, 2012, the PCRA court granted relief by reinstating Appellant's right to file a notice of appeal *nunc pro tunc* from the September 9, 2009 order denying his first PCRA petition. Appellant timely filed a *pro se* notice of appeal *nunc pro tunc* on February 16, 2012. The court did not order Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b).

Appellant raises three issues for our review:

WHETHER THE PCRA COURT'S FACTUAL FINDINGS AND CONCLUSIONS OF LAW ARE SUPPORTED BY THE RECORD AND FREE OF LEGAL ERROR INSOFAR AS THE COURT FOUND THAT APPELLANT WAS NOT DENIED HIS DUE PROCESS RIGHTS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS FOR ALLOWING COURT APPOINTED COUNSEL TO WITHDRAW AS COUNSEL WITHOUT COMPORTING TO THE MANDATES SET FORTH IN ***COMMONWEALTH V. FINLEY?***

WHETHER THE PCRA COURT'S FACTUAL FINDINGS AND CONCLUSIONS OF LAW ARE SUPPORTED BY THE RECORD AND FREE OF LEGAL ERROR INSOFAR AS THE COURT FOUND THAT APPELLANT WAS NOT DENIED HIS DUE PROCESS RIGHTS UNDER BOTH STATE AND FEDERAL CONSTITUTIONS WHEN IT FOUND THAT APPELLANT WAS NOT DENIED HIS RIGHT TO EFFECTIVE [PCRA] COUNSEL?

WHETHER THE PCRA COURT'S FACTUAL FINDINGS AND CONCLUSIONS OF LAW ARE SUPPORTED BY THE RECORD AND FREE OF LEGAL ERROR INSOFAR AS THE COURT FOUND THAT IT DID NOT ABUSE ITS DISCRETION FOR

FAILING TO CONDUCT AN EVIDENTIARY HEARING WHEN
THE CLAIMS RAISED IN [THE] PCRA PETITION RAISED
MATERIAL ISSUES OF FACT REQUIRING A HEARING.

(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). "[A] petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings." ***Commonwealth v. Taylor***, 933 A.2d 1035, 1040 (Pa.Super. 2007), *appeal denied*, 597 Pa. 715, 951 A.2d 1163 (2008).

In his first two issues, Appellant contends PCRA counsel failed to satisfy the ***Turner/Finley*** requirements for withdrawal. Specifically, Appellant complains that PCRA counsel failed to communicate with him about the case, failed to provide him with a copy of the "no-merit" letter, and failed to advise him of his rights in the event of a withdrawal. Appellant

claims the PCRA court compounded PCRA counsel's errors, because it failed to respond to written inquiries from Appellant regarding the status of his case. Under these circumstances, Appellant insists the PCRA court erroneously permitted PCRA counsel to withdraw representation.

Additionally, Appellant asserts PCRA counsel was ineffective for failing to satisfy the *Turner/Finley* requirements. Moreover, Appellant submits PCRA counsel was ineffective for failing to develop certain claims of trial counsel's ineffectiveness. Appellant contends there was arguable merit to the issues regarding trial counsel's ineffectiveness, PCRA counsel had no reasonable basis for failing to develop the issues, and Appellant would have received PCRA relief if counsel had developed the issues. Appellant concludes this Court must vacate the order denying PCRA relief and remand the matter for an evidentiary hearing. For the following reasons, Appellant's first and second issues are waived.

A settled principle of appellate review makes clear that Courts should not reach claims that were not raised in the trial court; this principle applies to PCRA appeals as well. *Commonwealth v. Colavita*, 606 Pa. 1, 28, 993 A.2d 874, 891 (2010). Claims of PCRA counsel's ineffectiveness likewise cannot be raised for the first time on appeal. *Id.* at 32 n.12, 993 A.2d at 893 n.12 (citing *Commonwealth v. Pitts*, 603 Pa. 1, 10 n.4, 981 A.2d 875, 880 n.4 (2009) (stating petitioner waived challenge to PCRA counsel's effectiveness where petitioner did not raise issue prior to appeal from order

denying PCRA relief; petitioner's attempt to obtain review, on PCRA appeal, of issue not raised in PCRA court amounted to serial PCRA petition on appeal; although petitioner asserted PCRA appeal was first opportunity to challenge PCRA counsel's stewardship, petitioner could have raised claim in response to Rule 907 notice)).

Instantly, PCRA counsel filed the "no-merit" letter on June 1, 2007, and the PCRA court issued Rule 907 notice that same day. On June 22, 2007, Appellant filed a *pro se* response to the Rule 907 notice. Significantly, Appellant's *pro se* response did not attack the "no-merit" letter or PCRA counsel's effectiveness. Rather, the *pro se* response listed issues that Appellant deemed "of arguable merit" and "cognizable" under the PCRA. (***See Pro Se Application to Vacate Notice of Dismissal Under Rule 907 and Grant Appointment of New Spanish Literate Attorney to Amend PCRA Petition, filed 6/22/07, at 1.***) The issues consisted of eight (8) claims of ineffective assistance of direct appeal and trial counsel.³ The *pro se* response also included a request for new, Spanish-speaking counsel "due to [Appellant's] language barrier and the merits of his claims...." (***Id.*** at 4). The case remained dormant until July 16, 2009, when the PCRA court re-issued the Rule 907 notice. Appellant did not respond to the re-issued Rule

³ Appellant presented the claims as bald assertions of ineffectiveness, and he did not argue that PCRA counsel was ineffective for failing to include the claims in the "no-merit" letter.

907 notice. On September 4, 2009, the PCRA court denied relief and permitted PCRA counsel to withdraw.⁴

Here, Appellant waived the issues pertaining to the adequacy of the “no-merit” letter and PCRA counsel’s ineffectiveness by failing to raise them in response to the issuance of the Rule 907 notice. *See Pitts, supra* at 9-10, 981 A.2d at 879-80 (emphasizing that petitioner’s failure to challenge “no-merit” letter or PCRA counsel’s effectiveness in PCRA court, following issuance of “no-merit” letter and Rule 907 notice, resulted in waiver of claims on appeal). Consequently, Appellant is not entitled to relief on his first or second claim.

In his third issue, Appellant asserts the Commonwealth presented two eyewitnesses at trial. Appellant concedes that trial counsel vigorously attacked the credibility of the eyewitnesses during opening and closing arguments. Nevertheless, Appellant insists trial counsel should have offered additional evidence to impeach the eyewitnesses’ testimony. Appellant argues trial counsel was ineffective in this regard, because trial counsel failed to investigate or present evidence of an anonymous tip to police regarding another suspect. Appellant further contends trial counsel was ineffective for failing to interview or present testimony from other eyewitnesses whose physical descriptions of the shooter did not match

⁴ Appellant first challenged the adequacy of PCRA counsel’s “no-merit” letter and PCRA counsel’s effectiveness in Appellant’s May 24, 2010 PCRA petition.

Appellant. In light of trial counsel's errors and omissions, Appellant concludes this Court must vacate the order denying PCRA relief and remand the matter for an evidentiary hearing. We disagree.

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Williams***, 597 Pa. 109, 950 A.2d 294 (2008). 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 omissions 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). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Williams, supra***.

"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). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004).

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. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective.

Pierce, supra at 524, 645 A.2d at 194-95 (internal citations omitted).

Prejudice is established when [a defendant] demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In [**Kimball, supra**], we held that a "criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Commonwealth v. Chambers, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002) (some internal citations and quotation marks omitted).

"This Court will not consider claims of ineffectiveness without some showing of factual predicate upon which counsel's assistance may be evaluated." **Commonwealth v. Thomas**, 783 A.2d 328, 333 (Pa.Super. 2001). "[T]o justify an evidentiary hearing with respect to assertions of ineffectiveness of trial counsel, it is required that an offer of proof be made that alleges sufficient facts upon which a reviewing court can conclude that trial counsel may have been ineffective." **Commonwealth v. Steward**, 775 A.2d 819, 832 (Pa.Super. 2001), *appeal denied*, 568 Pa. 617, 792 A.2d 1253 (2001). "Claims of ineffectiveness of trial counsel cannot be considered in a vacuum." **Id.**

"Where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests."

Commonwealth v. Sneed, ___ Pa. ___, ___, 45 A.3d 1096, 1107 (2012) (quoting **Colavita, supra** at 21, 993 A.2d at 887).

A finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued.

Sneed, supra at ___, 45 A.3d at 1107 (internal citations and quotation marks omitted).

"[T]o prevail on a claim of ineffectiveness for failing to call a witness, a [petitioner] must prove, in addition to meeting the three **Pierce** requirements, that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness's testimony was so prejudicial as to have denied him a fair trial." **Commonwealth v. Wright**, 599 Pa. 270, 331, 961 A.2d 119, 155 (2008).

To demonstrate...prejudice, a petitioner must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case. Thus, counsel will not be found ineffective for failing to call a witness unless the petitioner can show that the witness's testimony would have been helpful to the defense. A failure to call a witness is not *per se* ineffective assistance of counsel for such decision usually involves matters of trial strategy.

Sneed, supra at ____, 45 A.3d at 1109 (internal citations and quotation marks omitted). Ineffective assistance of counsel for failing to call a witness will not be found where a petitioner provides no affidavits from the alleged witnesses indicating their availability and willingness to cooperate with the defense. **Commonwealth v. McLaurin**, 45 A.3d 1131 (Pa.Super. 2012).

Instantly, the Commonwealth presented at Appellant's trial two eyewitnesses, Ms. Lawson and Ms. Miller, who testified that Appellant shot and killed the victim. In the August 30, 2005 *pro se* PCRA petition and June 22, 2007 *pro se* response to the Rule 907 notice, Appellant claimed trial counsel was ineffective for failing to introduce evidence to impeach the testimony of Ms. Lawson and Ms. Miller. To the extent Appellant argues that trial counsel should have utilized information contained in anonymous tip to police, Appellant's argument is based on a bald assertion that the tipster informed police that a man named "Ray" was the shooter. Appellant claimed to have learned about the anonymous tip from a "Police Activity Sheet dated September 28, 2001, that was provided to Appellant by Appellate Counsel...." (**See** Appellant's Brief at 27.) Appellant, however, failed to attach the Police Activity Sheet to his *pro se* filings or appellate brief. Absent any evidence to support the ineffectiveness allegation, Appellant's claim is without arguable merit. **See Thomas, supra; Steward, supra.**

Likewise, Appellant's *pro se* filings included an argument that trial counsel was ineffective for failing to interview and present additional

eyewitnesses, including Mr. Horockiwsky and Mr. Forrest, who would have provided physical descriptions of the shooter which did not match Appellant. Again, Appellant's argument is based on conjecture and bald assertions of his entitlement to relief. Importantly, Appellant also failed to obtain affidavits confirming the witnesses' existence, availability, and willingness to cooperate with the defense. ***See McLaurin, supra; Thomas, supra.*** Therefore, Appellant is not entitled to the relief he requests. Accordingly, we affirm the order dismissing Appellant's PCRA petition.

Order affirmed.