

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
THOMAS MICHAEL LISOWSKI,	:	
	:	
Appellant	:	No. 781 MDA 2013

Appeal from the PCRA Order April 25, 2013
In the Court of Common Pleas of Wyoming County
Criminal Division No(s): CP-66-CR-0000180-2007

BEFORE: MUNDY, WECHT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED FEBRUARY 06, 2014

Pro se Appellant, Thomas Michael Lisowski, appeals from the order entered in the Wyoming County Court of Common Pleas dismissing his first Post Conviction Relief Act¹ (“PCRA”) petition. He suggests the Commonwealth used perjured testimony to convict him and that the Commonwealth lacked jurisdiction to prosecute him. We affirm.

We adopt the facts and procedural history as set forth by the trial court.² Trial Ct. Op., 5/15/13, at 1-3 (unpaginated). On March 26, 2013,

* Former Justice specially assigned to the Superior Court.

¹ 42 Pa.C.S. §§ 9541-9546.

² We note that Appellant was sentenced to an aggregate sentence of twelve to twenty-four months in prison consecutive to another sentence. Order,

the PCRA court held a hearing on Appellant's petition. At the hearing, Appellant admitted he did not raise the issue of perjured testimony at trial. N.T., 3/26/13, at 19-20. The PCRA court subsequently issued a Pa.R.Crim.P. 907 notice. Appellant filed a motion for reconsideration on April 8, 2013, which the PCRA court denied the next day. On April 25, 2013, the PCRA court formally dismissed Appellant's petition. Appellant timely appealed and timely filed a court-ordered Pa.R.A.P. 1925(b) statement.

Appellant raises the following issues:

Whether a perjury [sic] testimony was used in gaining a convi[c]tion by the prosecution and w[h]eather this issue has been preserved for PCRA proceeding when [Appellant] used it in his appeal within his argument under insufficient evidence. **See** (1037 MDA 2010). Again [Appellant] will argue tha[t] the evidence was insufficient to support a conviction for aggravated assault; simple assault; recklessly endangering another person. Does the perjury [sic] testimony [a]ffect the sufficient evidence to convict?

Whether the Commonwealth Court of Pennsylvania [sic] had jurisdiction or venue to prosecute this case within the laws of our United States Constitu[t]ion?

Appellant's Brief at 5 (citations omitted).

For his first issue, Appellant contends the Commonwealth used perjured testimony to obtain his convictions. He insists that he raised this

10/7/11. Appellant, however, indicated he was released on parole. Appellant's PCRA Pet., filed 7/17/12; Appellant's Brief at 6. Out of an abundance of caution, we presume we have jurisdiction to entertain Appellant's PCRA petition. **See generally** 42 Pa.C.S. § 9543(a)(1)(i) (stating that petitioner, to be eligible for relief, must be "serving a sentence of imprisonment, probation or parole").

issue on direct appeal to this Court, but it was not addressed in this Court's prior opinion resolving his direct appeal. Appellant references testimony that, in his view, substantiates his allegation of perjured testimony. We hold Appellant is not entitled to relief.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Abu-Jamal***, 941 A.2d 1263, 1267 (Pa. 2008).

To be entitled to PCRA relief, a petitioner must establish, by a preponderance of the evidence, his conviction or sentence resulted from one or more of the errors found in 42 Pa.C.S. § 9543(a)(2), his claims have not been previously litigated or waived, ***id.***, § 9543(a)(3), and "the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." ***Id.***, § 9543(a)(4). . . . An issue is waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state postconviction proceeding." ***Id.***, § 9544(b).

Commonwealth v. Keaton, 45 A.3d 1050, 1060 (Pa. 2012). One of the errors listed in section 9543(a)(2) is a violation of the laws, "which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i). With respect to perjured testimony, perjury is a "deliberate or willful falsehood." ***Commonwealth v. Pursell***, 724 A.2d 293, 307 (Pa. 1999). "Minor discrepancies in the Commonwealth's

case will not be considered false evidence.” ***Commonwealth v. Ali***, 10 A.3d 282, 294 (Pa. 2010).

Instantly, Appellant has not established that he raised the issue at or before trial, or on direct appeal. ***See Keaton***, 45 A.3d at 1060. Indeed, Appellant admitted he did not raise the issue at trial. ***See*** N.T., 3/26/13, at 19-20. Further, we have reviewed the prior appellate decisions in this matter and discern no challenge based on perjured testimony. ***See Commonwealth v. Lisowski***, 111 MDA 2008 (unpublished memorandum) (Pa. Super. Apr. 23, 2009) (“***Lisowski I***”); ***see also Commonwealth v. Lisowski***, 1037 MDA 2010 (Pa. Super. Aug. 11, 2011) (“***Lisowski II***”).

Appellant refers us to various exchanges in the trial transcript,³ but nowhere does he explicitly level a charge of perjury. Regardless, we have reviewed Appellant’s cited exchanges and fail to discern how they establish “deliberate or willful falsehood[s].” ***See Pursell***, 724 A.2d at 307; ***see also Ali***, 10 A.3d at 294. Furthermore, Appellant has not demonstrated that the reliability of the verdict was undermined given Appellant’s own inculpatory statement that he assaulted the officer. ***See generally Lisowski I***, at 1-3 (summarizing facts, including inculpatory testimony); ***see also Lisowski II***, at 1-2, 11 (summarizing testimony establishing aggravated assault).

³ Appellant also referred this Court to testimony taken at the hearing on his motion to modify his bail. ***See*** Appellant’s Brief at 10 (citing testimony taken on February 5, 2010, the date of hearing on motion to modify bail). We decline to consider that testimony given the procedural posture.

Accordingly, we discern no legal error in the PCRA court's ruling. **See *Abu-Jamal***, 941 A.2d at 1267.

Lastly, Appellant claims that Pennsylvania lacked the constitutional authority to prosecute him due to a lack of a constitutional "Savings Clause."⁴ He reasons that because the Pennsylvania Constitution of 1968 lacked a Savings Clause, all statutes are void. We conclude Appellant is not entitled to relief.

Instantly, Appellant's argument pertains to whether Pennsylvania courts had jurisdiction to impose his judgment of sentence. Appellant's argument does not credibly challenge the trial court's jurisdiction to impose judgment of sentence. Pa. Const. art. V, § 5 (bestowing "unlimited original jurisdiction in all cases" on trial court).⁵ Accordingly, having discerned no error of law or abuse of discretion, we affirm the order below. **See *Abu-Jamal***, 941 A.2d at 1267.

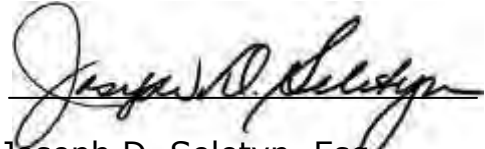
Order affirmed.

⁴ A "Savings Clause" is "[a] statutory provision exempting from coverage something that would otherwise be included. • A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost." Black's Law Dictionary 1461 (9th ed. 2009).

⁵ We observe that the legislature has the power to enact criminal law pursuant to the Constitutions of 1874 and 1968.

J. S07039/14

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: 2/6/2014

IN THE COURT OF COMMON PLEAS OF THE 44TH JUDICIAL DISTRICT
WYOMING COUNTY BRANCH – CRIMINAL DIVISION

COMMONWEALTH OF
PENNSYLVANIA

vs.

THOMAS M. LISOWSKI,
Defendant

CRIMINAL ACTION – LAW

NO. 2007-CR-180

2013 MAY 15 AM 11:58

FILED
PROTHONOTARY
WYOMING COUNTY, PA

Christopher Schmidt, Esquire – Attorney for the Commonwealth
Thomas Lisowski, *pro se*

OPINION

Shurtleff, P.J., May 14, 2013:

AND NOW, this 15th day of May, 2013, this Court being in receipt of Defendant's Concise Statement of Matters Complained of on Appeal, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that this Opinion is in support of this Court's Order dated March 26, 2013 denying Defendant's Petition for Post Conviction Relief.

I. BRIEF FACTS

On April 9, 2007, Defendant Thomas Lisowski (hereinafter "Defendant") was the backseat passenger in a vehicle being driven by his half brother, Jason Severcool (hereinafter "Severcool"). Severcool's girlfriend, Kristen Marshall (hereinafter "Marshall"), was also in the vehicle. Due to the high rate of speed with which the vehicle was travelling and the fact that the vehicle matched the description of a vehicle believed to be involved in a robbery, the vehicle attracted the attention of Pennsylvania State Troopers Tracy Flynn and Michael Maguire. (N.T., 4/20/10, pp. 78-9, 102-3, 108). The troopers pursued the vehicle with lights and sirens activated. (N.T., 4/20/10, pp. 79-80). A high-speed chase ensued for several miles over a number of back-country roads. (N.T., 4/20/10, pp. 80-1, 161-2, 176-8).

Eventually the vehicle came to a stop and Defendant and Severcool ran into the woods. (N.T., 4/20/10, p. 81). Marshall remained in the vehicle. (N.T., 4/20/10, p. 86). The troopers followed the men. Upon entering the woods, Trooper Maguire tripped on a log but was quickly able to tack Severcool by jumping on his back. (N.T., 4/20/10, p. 81). Both men slid down an embankment and at that point, Severcool was face down with Trooper Maguire straddled on Severcool's back. (N.T., 4/20/10, pp. 82-3).

As Trooper Maguire was about to handcuff Severcool, who was offering no resistance, Defendant attacked the trooper from behind. (N.T., 4/20/10, pp. 83-5). Defendant knocked Trooper Maguire over and proceeded to beat the trooper with his fists. (N.T., 4/20/10, pp. 85, 88-89). During the attack, Defendant made several threatening comments to the trooper. (N.T., 4/20/10, pp. 85, 88-89). Defendant and Severcool then escaped further into the woods. (N.T., 4/20/10, p. 89).

Trooper Maguire suffered a broken leg from the incident and was transferred via ambulance to a hospital. (N.T., 4/20/10, p. 93). Later that same day, Defendant and Severcool were arrested. While Defendant denied any involvement with the incident, Severcool made a statement fully implicating himself and his brother.

In 2007 a jury convicted Defendant of all charges after a trial. Defendant filed a direct appeal to the Pennsylvania Superior Court. The Superior Court vacated the judgment of sentence and remanded for resentencing. After resentencing occurred, Defendant filed post-sentence motions and the trial court granted him a new trial because of an insufficient waiver of counsel prior to the first trial.

Thereafter, in April of 2010 Defendant proceeded to a trial *pro se* with the assistance of standby counsel. Following the jury trial, Defendant was convicted of aggravated assault, 18

Pa.C.S.A. §2702(a)(3), simple assault, 18 Pa.C.S.A. §2701(a)(1), recklessly endangering another person, 18 Pa.C.S.A. §2705, resisting arrest, 18 Pa.C.S.A. §5104, and fleeing or attempting to allude police officer, 75 Pa.C.S.A. §3733. Defendant was sentenced on May 12, 2010 this Court imposed an aggregate sentence of sixty three (63) to one hundred ninety two (192) months, with each count running consecutively. (Order, 5/12/10).

Defendant filed a *pro se* direct appeal to the Pennsylvania Superior Court and on August 11, 2011, the Superior Court vacated the judgment of sentence and remanded for resentencing. Defendant was resentenced on October 7, 2011 to Thirty Nine (39) to One Hundred Forty Four (144) months. (Order, 10/7/11). Defendant was paroled and released from incarceration on July 16, 2012.

Defendant filed a *pro se* Petition for Post Conviction Relief on July 23, 2012 alleging prosecutorial misconduct and that this Court lacked jurisdiction. The Attorney General of the Commonwealth filed a response and argument¹ was held thereon, after which this Court denied Defendant's Petition. An appeal to the Pennsylvania Superior Court has been filed and the matter is now ripe for discussion.

II. DISCUSSION

A claim is waived under the Post Conviction Relief Act (hereinafter "PCRA") if the defendant could have raised the issue at trial, on appeal, or in a prior post conviction proceeding but failed to do so. See, 42 Pa.C.S.A. §9543(a)(3). In his Petition for Post Conviction Relief, Defendant alleges prosecutorial misconduct and that this Court lacked jurisdiction over this matter². Upon review of the record, these issues were never raised with this Court during or after

¹ During argument on Defendant's Petition he was given a colloquy regarding proceeding *pro se*. Furthermore, standby counsel was appointed and present.

² The events leading up to Defendant's arrest on April 9, 2007 all occurred in Tunkhannock Township, Wyoming County, Pennsylvania.

trial. No objections were made at trial to the testimony of Trooper Maguire. The jurisdiction of this Court was not challenged. Following a finding of guilt, Defendant filed a direct appeal to the Pennsylvania Superior Court. The issue of perjury and jurisdiction were not raised in Defendant's appeal. In fact, Defendant admitted during argument on his Petition for Post Conviction Relief that the issues of prosecutorial misconduct and jurisdiction had not been previously raised at trial or on appeal. More specifically, Defendant stated:

And like he's saying, I haven't raised them issues in the trial was simply because I didn't have time during the trial to sit there and review the records and show what was inconsistent or what wasn't true. Now, I did argue that – in my – it does show in my direct appeal, I argued that perjury testimony and it was ignored by the Superior Court simply because I read case law that said that anything that has to do with inconsistent testimonies is to be done for a PCRA hearing in front of the court and to give the court first notification to have time to review it and decide if it's true or not before the Superior Court can look at it.

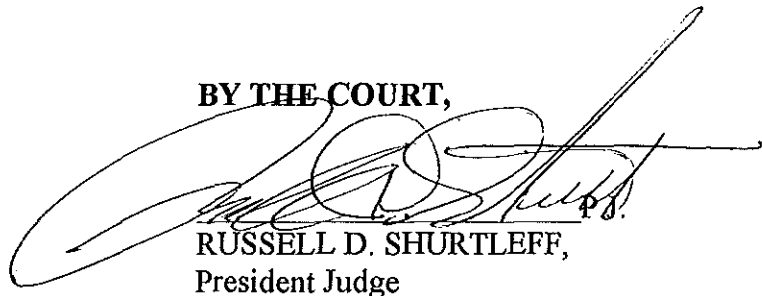
(H.T. 3/26/13, pp. 19-20). As such, there are no genuine issues of material fact before this Court and the Court determined that hearing on Defendant's Petition was unnecessary.

III. CONCLUSION

Based upon the foregoing, Defendant's Petition for Post Conviction Relief was

DENIED.

BY THE COURT,



RUSSELL D. SHURTLEFF,
President Judge

cc:
Christopher Schmidt, Esquire
Thomas Lisowski