NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. VARIAN CALLAHAN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 802 WDA 2012

Appeal from the PCRA Order March 20, 2012
In the Court of Common Pleas of Mercer County
Criminal Division at No(s): CP-43-CR-0000008-2009

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.: Filed: March 11, 2013

Varian Callahan appeals from the order denying his first counseled post-conviction relief petition. After careful review, we affirm.

A jury convicted Appellant of robbery, theft, receiving stolen property, terroristic threats, and recklessly endangering another person ("REAP"), based on the following evidence. On December 17, 2008, Appellant approached the victim as she was taking her three-year-old son to day care at approximately 7:20 a.m. Appellant told the victim that he had a gun and demanded that she give him her money. The victim did not see a weapon and informed Appellant that she did not have any money. Appellant said that she had money in her purse or a bank account. The victim pleaded with Appellant not to harm her or her son. Appellant said that he would not hurt her if she turned over her money. The victim then walked with Appellant to

her vehicle, where she removed two hundred dollars. Appellant fled with the money, and the victim took her son into day care and asked a teacher to call the police.

Police transported the victim to the police station where she provided a statement. The victim also informed police that her assailant was wearing a black winter hat, a gray coat, and had a goatee. Police broadcast this information via their police radio. During the police interview with the victim, an officer observed a person matching the description of the perpetrator, whom he identified by name as Varian Callahan. The officer interviewing the victim, Officer Ryan Chmura, then left the police station in his cruiser to investigate the potential suspect. A 911 dispatcher also relayed that there was an outstanding arrest warrant for Appellant.

Officer Chmura located Appellant walking approximately six blocks from the day care and advised him of the outstanding warrant and that he was under arrest. Appellant fled before being tackled by Officer Chmura. He and two other officers attempted to remove Appellant's hands from his front waist area while Appellant continued to resist. Police then dry stunned him with a taser.[1] Appellant did not have a weapon or any money on his person. The dry stun occurred at 7:56 a.m., approximately one-half hour after the reported robbery. Following Appellant's arrest, Officer Chmura

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[1] A dry stun is when the taser is placed in direct contact with the person.

returned to the police station and compiled an eight person photographic array. The victim immediately identified Appellant as her attacker and subsequently identified him at trial. Appellant presented a teenage relative as an alibi witness. Nevertheless, the jury convicted Appellant, and he was sentenced on June 3, 2010, to ten to twenty years incarceration for the robbery, pursuant to 42 Pa.C.S. § 9714.[2] The court also imposed concurrent sentences of one to two years imprisonment for both the terroristic threats and REAP charges.

Appellant filed a timely direct appeal, raising sufficiency and weight of the evidence claims. A panel of this Court found the issues waived because Appellant's counsel failed to cite any pertinent authority relative to the sufficiency argument and did not file a post-sentence motion preserving the weight issue. Although the panel did not reach the merits of any of Appellant's issues, it did not dismiss or quash the appeal but affirmed his judgment of sentence. ***Commonwealth v. Callahan***, 23 A.3d 569 (Pa.Super. 2010) (unpublished memorandum).[3]

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[2] 42 Pa.C.S. § 9714 requires a mandatory minimum sentence of ten years for a person convicted of a crime of violence who has a prior violent crime conviction. The robbery conviction at issue is a statutorily defined crime of violence and Appellant was previously convicted of attempted rape.

[3] In ***Commonwealth v. Fink***, 24 A.3d 426 (Pa.Super. 2011), decided after Appellant's direct appeal but discussing ***Commonwealth v. Franklin***, 823 A.2d 906 (Pa.Super. 2003), we concluded that either an affirmance or quashal based on waiver of all issues constituted *per se* ineffectiveness.

Thereafter, Appellant filed a timely *pro se* PCRA petition. Appellant alleged that he was deprived of his direct appeal rights due to counsel's ineffectiveness, counsel was ineffective in withdrawing a suppression motion, and that counsel rendered ineffective assistance by not calling an alibi witness, Nefertari Callahan.[4] The PCRA court appointed counsel and scheduled a conference on the matter. After the conference, the court scheduled an evidentiary hearing and permitted counsel twenty days to file an amended petition. Counsel did not submit an amended PCRA petition,[5]

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[4] Ms. Callahan is referred to as both Nefertari and Nefatari throughout the filings of the parties and the PCRA court. She is Appellant's aunt and the mother of the alibi witness called during Appellant's trial.

[5] We disapprove of counsel's failure to file an amended petition. Once counsel is appointed, he or she is required to amend inartfully drafted petitions. ***See Commonwealth v. Sangricco***, 415 A.2d 65, 68-69 (Pa. 1980); ***Commonwealth v. Ollie***, 450 A.2d 1026 (Pa.Super. 1982). Indeed, we note that the failure to file an amended petition or present a brief arguing on behalf of the defendant can constructively deny a petitioner his right to a counseled PCRA proceeding. ***See Commonwealth v. Powell***, 787 A.2d 1017, 1019 (Pa.Super. 2001); ***Commonwealth v. Priovolos***, 746 A.2d 621, 625 (Pa.Super. 2000); ***Commonwealth v. Davis***, 526 A.2d 440 (Pa.Super. 1987); ***see also Sangricco, supra; Commonwealth v. Tedford***, 781 A.2d 1167, 1171 (Pa. 2001) ("the PCRA court erred by dismissing Appellant's *pro se* PCRA Petition rather than directing Appellant to file an amended petition with legal assistance, as Pennsylvania Rule of Criminal Procedure 1505(b) clearly mandates."); ***Commonwealth v. Burkett***, 5 A.3d 1260, 1277 (Pa.Super. 2010) (collecting cases).

Since counsel adequately represented Appellant at the PCRA evidentiary hearing herein, counsel was not *per se* ineffective in neglecting to file an amended petition. ***See Commonwealth v. Murray***, 836 A.2d 956, 961 (Pa.Super. 2003), *reversed on other grounds by* ***Commonwealth v. Robinson***, 970 A.2d 455 (Pa.Super. 2009) (*en banc*) (remand

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but appeared at the hearing. At the evidentiary hearing, counsel elicited testimony from Ms. Callahan regarding her availability to testify, as well as the substance of what testimony she would have offered at trial. Ms. Callahan testified that during December of 2008, Appellant was staying with her. She stated that she could not recall the day or exact date in December that Appellant was arrested in this matter. Nevertheless, she related that the last day she saw him he was at her home, along with her daughter, at approximately 7:25 a.m. Ms. Callahan then gave Appellant a ride to French and Hamilton Streets and dropped him off around 7:30 a.m. She confirmed that she was not contacted or interviewed for this case by counsel or an investigator, but that she was available and willing to testify.

Additionally, counsel thoroughly examined trial counsel regarding his failure to interview or call Ms. Callahan. In this regard, counsel acknowledged that he did not interview Ms. Callahan nor did he send someone else to interview her. Trial counsel was unsure if he knew of Ms. Callahan on the eve of trial or before that time, but admitted that he was aware of her existence before trial. He specifically stated that in hindsight he would have liked to have interviewed Ms. Callahan.

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unnecessary where counsel did not file an amended petition but advocated on behalf of client at evidentiary hearing). Nonetheless, we caution the PCRA court against dismissal of a petition after the appointment of counsel absent the filing of either a counseled amended petition, brief, or memorandum of law.

Following the evidentiary hearing, the PCRA court granted Appellant relief in the nature of restoring his post-sentence motion and direct appeal rights.[6] Specifically, the court stated,

> [D]efendant's Petition for Post-Conviction Relief is granted to the extent that the defendant shall be permitted to file a post-verdict motion raising the issue of weight of the evidence; the defendant's appellate rights are reinstated to the extent that he may re-file a notice of appeal on the issues of weight, after filing said post-verdict motions, and pursue sufficiency of the evidence on appeal.
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> THE COURT NOTES counsel shall cite case law in support of the argument of sufficiency of the evidence.

PCRA Court Order, 3/20/12, at 1.

However, the PCRA court also indicated that it was denying Appellant's claim as to the failure to call the alibi witness. ***But see Commonwealth v. Markowitz,*** 32 A.2d 706, (Pa.Super. 2011); ***Commonwealth v. Bronaugh***, 670 A.2d 147, 149 (Pa.Super. 1995); ***Commonwealth v. Hoyman***, 561 A.2d 756 (Pa.Super. 1989) (finding it premature for PCRA court to deny relief on remaining ineffectiveness claims after reinstating the defendant's direct appeal rights). Appellant, nevertheless, did not file a post-sentence motion or seek to file a direct appeal *nunc pro tunc* from his judgment of sentence. Instead, Appellant appealed from the PCRA court's

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[6] The Pennsylvania Supreme Court amended Pa.R.Crim.P. 908 on July 27, 2012, effective September 1, 2012, to reflect that when a PCRA court reinstates a defendant's direct appeal rights, it must set forth the time limits to file the direct appeal. ***See*** Pa.R.Crim.P. 908(E) and Comment thereto. The amended rule was not in effect at the time of the underlying decision.

denial of his claim related to trial counsel's failure to call an alibi witness. The PCRA court directed Appellant to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the court authored its Pa.R.A.P. 1925(a) decision. The matter is now ready for our review. Appellant's sole question on appeal is, "was trial counsel ineffective for failing to present the testimony of Nefatari Callahan at trial?" Appellant's brief at 3.

Preliminarily, we note that ordinarily it is improper for a PCRA court to decide the merits of trial counsel's ineffectiveness when it reinstates a defendant's direct appeal rights. ***See Bronaugh***, ***supra***; ***Hoyman***, ***supra***. However, since Appellant elected to file this appeal rather than filing a *nunc pro tunc* direct appeal, we will address the denial of his alibi ineffectiveness claim. In considering a PCRA court's decision, we are guided by the following precepts.

> 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.*** Further, 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). Where the petitioner raises questions of law, our standard of review is *de novo* and our

> scope of review plenary. ***Commonwealth v. Colavita***, 606 Pa. 1, 993 A.2d 874, 886 (2010).

Commonwealth v. Ford, 44 A.3d 1190, 1194 (Pa.Super. 2012).

"To properly plead ineffective assistance of counsel, a petitioner must plead and prove: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act. If a petitioner fails to plead or meet any elements of the above-cited test, his claim must fail." ***Id***. at 1194.

In addition, where the claim pertains to counsel's alleged failure in calling a witness, the petitioner must prove: (i) the witness existed; (ii) the witness was available to testify; (iii) counsel knew of, or should have known of, the existence of the witness; (iv) the witness was willing to testify; and (v) the absence of the testimony was so prejudicial as to have denied the defendant a fair trial. ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1143 (Pa. 2011); ***Commonwealth v. Cox***, 983 A.2d 666, 692 (Pa. 2009).

Appellant begins by pointing out that trial counsel knew of the existence of the witness, the witness was available to testify, and was willing to testify. He asserts that counsel could not have had a reasonable basis for not presenting the witness since counsel "indicated that he realized the

witness should have been interviewed[.]" Appellant's brief at 6.[7] The PCRA court agreed that the witness was available and would have testified, but ruled that Appellant could not establish actual prejudice. According to the PCRA court, Ms. Callahan's testimony was cumulative of the alibi witness that Appellant did present. In addition, the court reasoned that her inability to recall the precise date in question rendered her testimony insufficient to warrant a finding of actual prejudice.

Appellant submits, however, that Ms. Callahan's testimony confirmed his own testimony and that of his alibi witness at trial, Ms. Callahan's daughter. Further, Appellant maintains that Ms. Callahan's inability to state the exact date is not dispositive since she did not see Appellant after the day she testified about dropping him off, due to Appellant's incarceration. Thus, inferentially, Ms. Callahan was testifying about the date of Appellant's arrest. The Commonwealth replies that the combination of the victim's unequivocal identification and Ms. Callahan being incapable of specifying the date in question results in Appellant being unable to establish actual prejudice.

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[7] Appellant does not argue that counsel was ineffective for failing to investigate and interview the witness. ***See Commonwealth v. Mabie***, 369 A.2d 369 (Pa. 1976); ***Commonwealth v. Perry***, 644 A.2d 705 (Pa. 1994). The failure to interview or investigate a witness is distinct from the failure to call a witness. ***Commonwealth v. Dennis***, 950 A.2d 945, 960 (Pa. 2008) (discussing ***Perry*** and ***Mabie***). Of course, a petitioner would still be required to establish actual prejudice. ***Id***.

This Court has held on several occasions that the failure to present additional alibi witnesses does not constitute ineffective assistance where the testimony is cumulative of testimony that was introduced at trial by persons other than the defendant. ***Commonwealth v. Olivencia***, 402 A.2d 519 (Pa.Super. 1979); ***Commonwealth v. McKendrick***, 514 A.2d 144, 150 (Pa.Super. 1986); ***but see Commonwealth v. Dennis***, 950 A.2d 945, 963 n.14 (Pa. 2008) ("In a case built on eyewitness testimony of an event that happened quickly. . . . Where the defense is one of mistaken identity, and the only alibi witness Appellant presents is his father, it seems plain that the addition of an unrelated alibi witness whose testimony corroborates other testimony tending to exculpate Appellant is not "merely cumulative[.]"). Moreover, we have opined that a defendant must establish that his alibi witness can unequivocally state that the defendant was with him or her at the time of the crime. ***Commonwealth v. Early***, 546 A.2d 1236 (Pa.Super. 1988); ***Commonwealth v. Wallace***, 500 A.2d 816 (Pa.Super. 1985).

Appellant's position fails on both of these grounds. First, Ms. Callahan did not offer testimony that she knew the date when Appellant was with her. Second, assuming that Ms. Callahan would have recalled this information had trial counsel interviewed her earlier, the evidence is cumulative of testimony offered by the alibi witness offered at trial. Thus,

we find that Appellant failed to meet his burden of establishing actual prejudice.

Order affirmed.