

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
McKINLEY CLARK,	:	
	:	
Appellant	:	No. 883 EDA 2013

Appeal from the PCRA Order March 19, 2013,
Court of Common Pleas, Delaware County,
Criminal Division at No. CP-23-CR-0007833-2007

BEFORE: GANTMAN, DONOHUE and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED DECEMBER 13, 2013

McKinley Clark ("Clark") appeals from the order of court dismissing his petition for relief filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"). Following our review, we affirm.

In 2009, Clark was convicted of delivery of a controlled substance and possession of controlled substances. He received an aggregate sentence of 7 to 14 years of imprisonment. The facts underlying these convictions were aptly summarized by the PCRA court as follows:

On October 10, 2007, Trooper Skahill, a Pennsylvania State Police Trooper for 13 years[] and a veteran of hundreds of undercover drug operations, had two telephone conversations with Clark in the course of an undercover operation. Clark, who identified himself as 'Blue,' agreed to sell Trooper Skahill 100 grams of heroin for \$7,300 and a kilogram of cocaine for \$22,000. The next day, Trooper Skahill and Clark arranged to meet at the

Philly Diner in Essington, Pennsylvania to complete the deal.

Clark spoke with Christopher Linder, a heroin user Clark had known for six weeks, and offered Linder \$80.00 worth of heroin in exchange for a ride. Linder knew Clark as 'Blue.' Linder picked up Clark in Philadelphia, and Clark told Linder where to drive. They stopped once along the way when Clark said he needed a drink. Clark exited the car, walked around the corner, returned a few minutes later, and the two continued on their trip. Back in the car, Clark made multiple phone calls to Trooper Skahill to obtain directions and confirm that they would meet in the Philly Diner's parking lot. Clark told Linder that he was meeting a girl at the Philly Diner, and that he had placed the payment for the ride (\$40.00 and four bags of heroin marked with the word 'Hulk') in the center console of Linder's car. When they arrived at the diner, Clark instructed Linder to pull into the parking lot, where he exited the car and walked away.

Trooper Skahill was in an undercover vehicle at the diner with State Trooper Miscannon (another experienced vice officer) and a female confidential informant ('CI'). Clark approached the vehicle, entered the rear passenger side and introduced himself as 'Blue.' Trooper Skahill recognized Clark's voice as the same voice from his telephone conversations with 'Blue.' Clark handed the trooper a black bag containing 122 grams of heroin, explaining that he had included extra heroin as an act of good faith because he did not have the kilogram of cocaine at that time. This amount of heroin yields over 4,000 dosage unit (.25-.30 gram) bags for individual retail sale with a street value of \$40,000.

The troopers arrested Clark and seized from his person two cell phones, three bags of heroin stamped 'Hulk', two bags of marijuana and a collection of oxycodone and dihydrocodeinone pills.

The police also arrested Linder and recovered four packs of heroin stamped 'Hulk' inside two \$20.00 bills in the center console of Linder's car.

Clark filed a pretrial motion to reveal the CI's identity, which the [c]ourt denied. Clark contended that the CI's testimony would exculpate him because the CI might be able to testify that (1) Clark had no knowledge that heroin was in the black bag he delivered to Trooper Skahill, and (2) Clark merely believed that he would only receive sexual favors for delivering whatever was in the bag. The Court found this argument speculative. Clark's former attorney did not raise this issue on direct appeal.

PCRA Court Opinion, 7/3/13, at 3-5 (citation to notes of testimony omitted).

This Court affirmed Clark's judgment of sentence on direct appeal and the Pennsylvania Supreme Court denied Clark's petition for allowance of review. Clark then timely filed a PCRA petition, raising four claims of ineffective assistance of counsel.¹ The PCRA court issued notice of its intention to dismiss Clark's petition without a hearing, and Clark did not file a response to this notice. Subsequently, the PCRA court dismissed Clark's petition, and this timely appeal followed.

On appeal, Clark challenges the dismissal of all four claims he raised in his PCRA petition. We address these claims cognizant of the following standard of review:

Our review of a PCRA court's grant or denial of relief is limited to examining whether the court's determination is supported by the evidence and

¹ Clark was represented by Nino Tinari, Esquire, both during trial and on direct appeal.

whether it is free of legal error. This Court grants great deference to the findings of the PCRA court, and we will not disturb those findings merely because the record could support a contrary holding. The findings of a post-conviction court will not be disturbed unless they have no support in the record.

Commonwealth v. Hickman, 799 A.2d 136, 140 (Pa. Super. 2002) (internal citations omitted).

All four of the issues Clark raises involve allegations of ineffective assistance of counsel. Accordingly, we are mindful that in order prove ineffective assistance of counsel, an appellant must show (i) that the underlying claim is of arguable merit; (ii) that counsel had no reasonable basis designed to effectuate the appellant's interests for the act or omission in question; and (iii) that counsel's ineffectiveness actually prejudiced the appellant. ***Commonwealth v. Moser***, 921 A.2d 526, 531 (Pa. Super. 2007). The failure to meet any prong of this test requires that the claim be dismissed. ***Id.***

In his first claim, Clark's alleges that trial counsel was ineffective for failing to raise the trial court's denial of his motion to reveal the identity of the CI on direct appeal. Appellant's Brief at 15. At trial, Clark testified that weeks before the events at issue, Linder introduced him to a man named Blue at a swingers' club. N.T., 2/5/09, at 19. According to Clark, who is African American, Blue was a white male in his thirties. ***Id.*** at 20. Clark testified that Blue ran an escort service and that Blue gave Clark his phone

number in case Clark ever wanted a "date" with one of the escorts, who were present at the swingers club. **Id.** at 21-22. Clark subsequently called Blue and arranged for a date with a particular girl Clark referred to as "Michelle." **Id.** at 23. Clark testified that Blue explained that Clark would be taken by one of his drivers to meet the girl "Michelle." **Id.** at 2. The next day, Clark claims, he telephoned Blue and was instructed to go to 65th and Girard Streets, where he found Linder in a car waiting for him. **Id.** at 24. Clark contends that Linder drove him to the Philly Diner and as he exited the vehicle, Linder handed him the black bag and a cell phone and asked him to return them to "Michelle." **Id.** at 33. Clark testified that as he walked through the parking lot, "Michelle" rolled down the window of the vehicle in which she was sitting with two men and motioned for Clark to approach. **Id.** at 34-35. Clark entered the rear of the vehicle and handed the black bag and cell phone to "Michelle," who then handed them to the man sitting next to her. **Id.** at 37. Clark testified that he had no knowledge of what was in the black bag. **Id.** at 34.

As noted above, prior to trial Clark filed a motion seeking to force the Commonwealth to divulge the identity of the woman he knew as "Michelle." In this motion, Clark alleged that "Michelle" "played an intrical [*sic*] part in setting up this event, she was present and part of conversations that took place inside the vehicle ... and has to be made available to testify at trial since she has evidence that could be exculpatory to [] Clark." Motion to

Compel Discovery, 12/13/07, at 2. Following a hearing, the trial court denied this request. It noted that Clark's reason for seeking the CI's identity was his belief "that the [CI] may be able to corroborate [his] assertion that [he] did not have knowledge that the package he was delivering contained heroin." Trial Court Order, 7/2/08, at 3, ¶ 5. The trial court reasoned that the CI could not possibly testify as to whether Clark knew what was in the black bag, and concluded that Clark failed to establish that the CI's testimony could exonerate him. *Id.* at 3, ¶ 7. It explicitly found that Clark's "simple conjecture and assertions that the [CI] knew what [Clark] was thinking is insufficient to permit the Commonwealth to reveal its [CI], especially in light of the Commonwealth's privilege." *Id.* at 3, ¶ 8.

In his PCRA petition, Clark argued that trial counsel was ineffective for failing to raise the denial of his request for the identity of the CI on direct appeal. PCRA Petition, 11/2/12, at 7-8. The PCRA court rejected this claim upon finding that it lacked arguable merit. PCRA Court Opinion, 7/3/13, at 7. Following our review of the record, we agree.

Whether the identity of a confidential informant who was also an eyewitness shall be disclosed is a matter left to the discretion of the trial court. **See** Pa.R.Crim.P. 573 (B)(2)(a)(i).² When ruling on such a request,

² This Rule provides, in relevant part, as follows:

In all court cases, except as otherwise provided in
Rules 230 (Disclosure of Testimony Before

the trial court must consider the following standards as set forth by the Supreme Court of Pennsylvania:

This Court has adopted the guidelines articulated by the United States Supreme Court in **Roviaro v. United States**, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), to guide trial courts in the exercise of their discretion in cases where, as here, the defendant requests the identity of a confidential informant who is also an eyewitness:

We believe that no fixed rule with respect to disclosure [of the confidential informant's identity] is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders the nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors.

Commonwealth v. Carter, 427 Pa. 53, 59, 233 A.2d 284, 287 (1967), (quoting **Roviaro**, at 60-62, 77 S.Ct. 623).

Investigating Grand Jury) and 556.10 (Secrecy; Disclosure), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable: (i) the names and addresses of eyewitnesses.

Pa.R.Crim.P 573(B)(2)(a)(i).

Further, ***before an informant's identity may be revealed, the defendant must establish pursuant to Pa.R.Crim.P. 305(B) that the information sought is material to the preparation of the defense and that the request is reasonable. Commonwealth v. Roebuck***, 545 Pa. 471, 477, 681 A.2d 1279, 1283 (1996). Only after a showing by the defendant that the information sought is material and the request reasonable is the trial court called upon to exercise its discretion to determine whether the information is to be revealed.

Commonwealth v. Bing, 551 Pa. 659, 663-64, 713 A.2d 56, 58 (1998) (emphasis added).

Clark presents three arguments on appeal in support of this claim. First, he argues that the trial court erred in its ruling because it did not require the Commonwealth to prove that the woman in the troopers' vehicle was a CI, such that the standard enunciated in ***Bing*** would apply. Appellant's Brief at 17. However, in Clark's motion seeking the identity of the woman in the vehicle, he refers to her as a confidential informant. **See** Motion to Compel Discovery, 12/13/07, at ¶¶ 4-7. As the record reveals that Clark knew the woman in the troopers' vehicle was a CI, this argument fails.

Clark next argues that the trial court applied an improper definition of what is "material" for purposes of this inquiry, in that it required him to prove that the testimony he sought would exonerate him rather than simply establishing that it would have been relevant and helpful in the preparation

of his defense. Appellant's Brief at 19-20. Clark is mistaken. As this Court recently held:

With regard to [a defendant's] burden of proving the requested information is material and reasonable [pursuant to Pa.R.Crim.P. 573(2)(a)], a defendant must show a reasonable probability that the information gained from the discovery would lead to evidence that would exonerate him. More than a mere assertion that the information disclosed might be helpful is necessary.

Commonwealth v. Garcia, 72 A.3d 681, 684 (Pa. Super. 2013) (citation omitted).

Moreover, given the nature of the offenses of which Clark was been convicted (delivery of a controlled substance and possession of controlled substances), we agree with the PCRA court's conclusion that Clark failed to meet this standard. Clark sought the identity of the CI to corroborate his account of what occurred in the troopers' vehicle and to "[d]etermin[e] 'Michelle's' knowledge of and relationship with Linder and/or Blue [because it] was relevant to ... proving that [Clark] was set up as he averred." ***Id.*** at 22. However, even if the CI testified that Clark was not "Blue" (as was his contention at trial), her testimony could not alter the fact that Clark produced a bag with a large quantity of heroin in the troopers' car. Additionally, the CI could not possibly testify as to whether Clark knew what was in bag. It therefore is not reasonably probable that the CI's testimony would exonerate Clark.

Lastly, Clark also argues that trial counsel was ineffective for failing to challenge the denial of his request for the CI's identity on direct appeal on the basis that the ruling "violated [Clark's] Confrontation Clause and Compulsory Process rights." Appellant's Brief at 23. However, the record reveals that trial counsel did not raise these constitutional violations in support of the motion seeking the identity of the CI. **See** Motion to Compel Discovery, 12/13/07. Because these claims were not raised in the trial court, trial counsel could not have raised them on appeal. **See Commonwealth v. Rush**, 959 A.2d 945, 949 (Pa. Super. 2008) (holding that claims not raised in the trial court may not be raised for the first time on appeal); **Commonwealth v. Santiago**, 980 A.2d 659, 666 n.6 (Pa. Super. 2009) ("[A] new and different theory of relief may not be successfully advanced for the first time on appeal."). Thus, all three arguments Clark raises in support of his counsel's ineffectiveness for failure to raise the denial of his request for the disclosure of the identity of the confidential informant fail.

In the second issue presented, Clark challenges the PCRA court's dismissal of his claim that trial counsel was ineffective for "waiving [Clark's] claim on direct appeal related to the inadequate jury instruction on [d]elivery of a [c]ontrolled [s]ubstance[.]" Appellant's Brief at 28. The record reveals that trial counsel challenged the trial court's jury instruction on this precise basis on direct appeal, but this Court found the issue waived

for failure to adequately develop an argument in support thereof. Nonetheless, the Panel addressed the merits of this issue and concluded that there was no error in the trial court's jury instruction. **See Commonwealth v. Clark**, 22 A.3d 1061 (Pa. Super. 2010) (unpublished memorandum). Accordingly, we conclude that there is no merit to the claim underlying this allegation of ineffective assistance of counsel; as such, it must fail. **Moser**, 921 A.2d at 531.

Next, Clark contends that trial counsel was ineffective for failing to properly respond to a certain hearsay objection made by the Commonwealth and for not challenging the trial court's ruling on this objection on direct appeal. Appellant's Brief at 33. The objection at issue came during Clark's testimony. Clark was testifying that Linder introduced him to a man named "Blue" at a swingers' club, a few weeks before the events at issue. N.T., 2/5/09, at 20. Clark testified that Blue, essentially a pimp, gave Clark his phone number and told Clark to call him if he was interested in having a date with any of the girls that were present at the swingers' club. **Id.** at 21-22. Clark then testified that he called Blue on the day before the incident to arrange a date with a particular girl, and that Blue told him that Clark would have to "be taken to the location by their drivers And I said that's fine, that's no problem. He then called me back and told me that I told him that ..." **Id.** at 23. At this point, the Commonwealth objected on the basis of hearsay. Trial counsel responded that the testimony was offered not for the

truth of the matter asserted, but to explain Clark's course of conduct. *Id.* at 23-24. The trial court sustained the objection and instructed Clark that "[y]ou can't tell me what a third party told you." *Id.* at 24. Immediately thereafter, trial counsel asked Clark, "As a result of the conversation, did you go to 65th and Girard?" *Id.* at 24. Clark responded affirmatively, and then testified that when he arrived at that location, Linder was in a vehicle waiting for him. *Id.* As Clark attempted to testify as to what Linder said to him while in the vehicle, the Commonwealth again objected on the basis of hearsay. The trial court sustained this objection.

In support of his ineffectiveness claim, Clark contends that trial counsel was ineffective for not challenging the propriety of the first hearsay ruling on direct appeal. Appellant's Brief at 35. He also argues that trial counsel was ineffective for not having a more appropriate argument in response to the other hearsay objection made during this portion of Clark's testimony. *Id.* at 36-38. Without addressing the merits of these arguments, the PCRA court concluded that Clark was not entitled to relief on this claim because he failed to prove that he was prejudiced by these alleged instances of ineffectiveness. PCRA Court Opinion, 7/3/13, at 11-12. We agree.

"To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Commonwealth v.***

King, ___ Pa. ___, ___, 57 A.3d 607, 613 (2012). Clark makes only the vague allegation that he was prejudiced because “the jury was generally instructed that they are to disregard any testimony they may have heard which had been objected to” and that the jury is presumed to have followed this instruction. Appellant’s Brief at 39. Notably, Clark does not indicate what, if any, pertinent evidence was kept from the jury because of these evidentiary rulings, nor does he identify what testimony the jury was required to disregard that would have led to a different outcome. Indeed, from our review of the record, the Commonwealth’s objections and the trial court’s rulings thereon did not keep the vital substance of Clark’s testimony from the jury, i.e., that he was accepting a ride from Linder to meet an escort and that Linder handed him the black bag and a cell phone to give to the escort, with no knowledge of what was inside the bag. **See** N.T., 2/5/09, at 27-34. As Clark has not established prejudice in connection with this claim, it fails.

Finally, Clark claims that trial counsel was ineffective for failing to argue on appeal that the trial court erred in overruling his objection to improper vouching by the Commonwealth during its closing argument. Appellant’s Brief at 39. In the portion of the Commonwealth’s closing at issue, the prosecutor recapped the testimony of Trooper Skahill and Trooper Miscannon and stated, “Do you think two state troopers, with over 30 years’ experience, are going to walk in on the stand and make that up?” N.T., 2/5/09, at 165. Clark argues that these remarks by the prosecutor

directly asked the jury to find a Commonwealth witness [*sic*] testimony more credible and worth more weight due to the sole fact that the witness was a [30] year veteran police trooper. There would be no other reason to mention the troopers [*sic*] 'vast' experience other than to vouch for the truth of his trial testimony.

Appellant's Brief at 40-41.

The PCRA court found that this claim lacked arguable merit. PCRA Court Opinion, 7/3/13, at 13. Again, we find no error with this conclusion.

[A] prosecutor has reasonable latitude during his closing argument to advocate his case, respond to arguments of opposing counsel, and fairly present the Commonwealth's version of the evidence to the jury. The court must evaluate a prosecutor's challenged statement in the context in which it was made. Finally, not every intemperate or improper remark mandates the granting of a new trial; reversible error occurs only when the unavoidable effect of the challenged comments would prejudice the jurors and form in their minds a fixed bias and hostility toward the defendant such that the jurors could not weigh the evidence and render a true verdict .

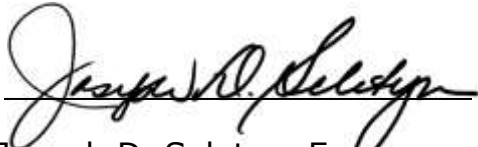
Commonwealth v. Hanible, 612 Pa. 183, 248, 30 A.3d 426, 465 (2011) (internal citations omitted). Furthermore, "a prosecutor's remark regarding the credibility of a witness for the Commonwealth does not constitute reversible error if it is a reasonable response to a prior attack on the credibility of that witness by the defense." ***Id.*** at 255, 30 A.3d at 469. The record reveals that in his closing argument, trial counsel vigorously challenged the credibility of Trooper Skahill's and Trooper Miscannon's

testimony. N.T., 2/5/09, at 143-50. The comment to which Clark now points reads as a direct response to trial counsel's attack on the troopers' credibility. As stated above, this is permissible and does not constitute reversible error. **Hanible**, 612 Pa. at 255, 30 A.3d at 469. We therefore find no error with the PCRA court's ruling.

For all of these reasons, we find no merit to Clark's claims on appeal and affirm the order of the PCRA court.

Order affirmed.

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: 12/13/2013