

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

LEON PARHAM

Appellant

No. 919 WDA 2012

Appeal from the PCRA Order June 1, 2012
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0014431-2005

BEFORE: BENDER, J., MUNDY, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.:

FILED: May 13, 2013

Appellant, Leon Parham, appeals from the June 1, 2012 order, denying his Post Conviction Relief Act (PCRA)¹ petition. After careful review, we affirm.

The PCRA court summarized the history of this case as follows.

On April 13, 2007, [Appellant] was convicted of the crimes of rape, rape of a child, statutory sexual assault and corruption of the morals of a minor following a jury trial. Originally, [Appellant] was sentenced to a period of incarceration of not less than fifteen nor more than forty years and [Appellant] filed timely post-sentence motions alleging that his sentence was illegal and that certain offenses merged for the purpose of sentencing. The post-sentence motions were granted and [Appellant]

* Retired Senior Judge assigned to the Superior Court.

¹ 42 Pa.C.S.A. §§ 9541-9546.

was sentenced to an aggregate sentence of not less than fourteen nor more than forty years. [Appellant] filed a direct appeal to the Superior Court and on February 24, 2010, the Superior Court affirmed the judgment of sentence imposed upon him by the Honorable John K. Reilly.^[2] [Appellant] filed a timely petition for post-conviction relief on January 10, 2011, and counsel was appointed for him so that an amended petition for post-conviction relief could be filed. Once the amended petition for post-conviction relief was filed, [Appellant's] case was assigned to [the Honorable David R. Cashman] in light of the death of the Honorable John K. Reilly. A hearing was held on May 31, 2012, and on June 1, 2012, this Court entered an order denying [Appellant's] petition for post-conviction relief.

PCRA Court Opinion, 11/7/12, at 2-3.

On June 13, 2012, Appellant filed this timely appeal. The PCRA court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), and Appellant timely complied on August 7, 2012. The PCRA court filed its Rule 1925(a) opinion on November 7, 2012.

On appeal, Appellant raises one issue for our review.

- I. Did the PCRA court (the Honorable David R. Cashman) abuse its discretion by determining that [Appellant] was not prejudiced by the fact that he never waived his right to have a judge present during jury selection and that an on-the-record colloquy was never conducted prior to the judgeless jury selection which occurred

² ***Commonwealth v. Parham***, 969 A.2d 629 (Pa. Super. 2009), *appeal denied*, 989 A.2d 916 (Pa. 2010).

immediately before [Appellant's] jury trial
before the Honorable John K. Reilly?

Appellant's Brief at 4.³

We begin by noting the following standard of review, guiding our consideration of this appeal. "On appeal from the denial of PCRA relief, our standard of review calls for us to determine whether the ruling of the PCRA court is supported by the record and free of legal error." **Commonwealth v. Calhoun**, 52 A.3d 281, 284 (Pa. Super. 2012) (citation omitted). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." **Commonwealth v. Garcia**, 23 A.3d 1059, 1061 (Pa. Super. 2011) (internal quotation marks and citation omitted), *appeal denied*, 38 A.3d 823 (Pa. 2012). "The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to our plenary review." **Commonwealth v. Johnson**, 966 A.2d 523, 532 (Pa. 2009) (internal quotation marks and citations omitted).

In addition, when reviewing a claim of ineffective assistance of counsel we apply the following test first articulated by our Supreme Court in **Commonwealth v. Pierce**, 527 A.2d 973 (Pa. 1987).

It is well-established that counsel is presumed effective, and the defendant bears the burden of proving ineffectiveness. To overcome this presumption, Appellant must satisfy a three-pronged

³ We note, Appellant has withdrawn the second issue posed in his PCRA petition and Rule 1925(b) statement. **Id.**

test and demonstrate that: (1) the underlying substantive claim has arguable merit; (2) counsel whose effectiveness is being challenged did not have a reasonable basis for his or her actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's deficient performance. A claim of ineffectiveness will be denied if the petitioner's evidence fails to meet any of these prongs.

Commonwealth v. Williams, 980 A.2d 510, 520 (Pa. 2009) (citations omitted), *cert. denied*, ***Williams v. Pennsylvania***, 130 S. Ct. 3353 (2010).

Further, prejudice from such deficient performance results only if, "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. Zook, 887 A.2d 1218, 1227 (Pa. 2005) (citation omitted). "Failure to establish any prong of the test will defeat an ineffectiveness claim." ***Commonwealth v. Birdsong***, 24 A.3d 319, 330 (Pa. 2011).

The procedure for conducting jury selection is prescribed by Pennsylvania Rule of Criminal Procedure 631. Pertinent to this appeal, the Rule provides as follows.

Rule 631. Examination and Challenges of Trial Jurors

(A) *Voir dire* of prospective trial jurors and prospective alternate jurors shall be conducted, and the jurors shall be selected, in the presence of a judge, unless the judge's presence is waived by the attorney for the Commonwealth, the defense attorney, and the defendant, with the judge's consent.

...

(C) *Voir dire*, including the judge's ruling on all proposed questions, shall be recorded in full unless the recording is waived. ...

Pa.R.Crim.P. 631(A), (C).

Instantly, Appellant essentially argues, on two alternative bases, that the PCRA court erred in failing to find trial counsel ineffective, where said counsel permitted jury selection to proceed outside the presence of the trial judge. Appellant's Brief at 11. First, Appellant alleges he never executed a waiver pursuant to Pennsylvania Rule of Criminal Procedure 631. ***Id.*** at 12. Second, he alleges in the alternative that no on-the-record colloquy was performed to ensure that Appellant's waiver was knowing and intelligent. ***Id.*** at 12-13.

With respect to Appellant's first basis, we note that the PCRA court made a factual finding that Appellant did execute a Rule 631 waiver, notwithstanding no written waiver is contained in the certified record. PCRA Court Opinion, 11/7/12, at 3-4. "In reviewing the record in this case it is clear that there was a written waiver of the [t]rial [c]ourt's presence during the jury selection process since [Appellant] acknowledged executing that waiver." ***Id.*** Our review of the record reveals support for the PCRA court's

finding of fact and, per our standard of review, we will not disturb that finding.⁴ **See Garcia, supra** at 1061.

With respect to Appellant's second basis, we note that our decision in **Commonwealth v. Fitzgerald**, 979 A.2d 908 (Pa. Super. 2009), *appeal denied*, 990 A.2d 727 (Pa. 2010) controls. In **Fitzgerald**, the appellant argued that his trial counsel was ineffective for permitting a Rule 631(A) waiver of the presence of the trial judge during jury selection that was defective as unknowing and unintelligent, and by failing to require an on-the-record colloquy. Therein, we held as follows.

Contrary to Appellant's contention that *voir dire* requires similar procedures as waivers of the rights to counsel and a jury trial, where a defendant, in consultation with counsel, waives his right to have a judge present during *voir dire*, neither the statute nor any case law requires that the defendant's waiver be knowing, voluntary, and intelligent or confirmed by an on-the-record oral colloquy.

Id. at 912.

Accordingly, Appellant has failed to establish the first prong of the **Pierce** test, *i.e.*, that the underlying claim has arguable merit. **See Williams, supra** at 520. We further agree with the PCRA court that

⁴ Appellant's March 13, 2008, post-sentence motion stated as follows. "[Appellant] notes that the mere fact that he voluntarily consented to such a proceeding – evidenced by his signature on a document beneath the words 'I ... Waive the Presence of a Judge' -" Appellant's Post-Sentence Motion, 3/3/08, at 5, ¶2.01. Additionally trial counsel testified at the PCRA hearing that Appellant made a counseled Rule 631 waiver. N.T., 5/17/12, at 17.

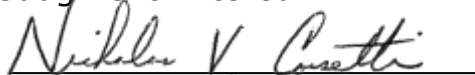
Appellant has failed to establish prejudice under the third prong of the **Pierce** test. Appellant has not alleged that the *voir dire* process was defective or that the empaneling of an objective jury was in any way compromised. **See Fitzgerald, supra** at 912 (noting where an appellant “makes no assertion that his conviction was the product of [potentially] biased jurors,” prejudice is not shown), and **cf. Commonwealth v. Noel**, 53 A.3d 848, 857 (Pa. Super. 2012) (requiring a showing of actual prejudice when counsel failed to object to incorrect *voir dire* procedure).

For all the foregoing reasons, we discern no abuse of discretion or legal error in the PCRA court’s denial of PCRA relief in this case. Therefore, we affirm the PCRA court’s June 1, 2012 order.

Order affirmed.

Judge Strassburger files a Concurring Memorandum.

Judgment Entered.

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

Deputy Prothonotary

DATE: May 13, 2013