NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. THEODORE R. MELENCHECK, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 94 WDA 2012

Appeal from the PCRA Order December 30, 2011
In the Court of Common Pleas of Washington County
Criminal Division at Nos.: CP-63-CR-0001409-2007
CP-63-CR-0001410-2007

BEFORE: GANTMAN, J., OTT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. **FILED AUGUST 9, 2013**

Appellant, Theodore R. Melencheck, appeals from the order denying his counseled petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546.[1] After review, we affirm and grant the application of Attorney Jeffrey A. Watson to withdraw his appearance in this matter.[2]

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* Retired Senior Judge assigned to the Superior Court.

[1] The order appealed from was dated December 29, 2011, but was not entered on the docket until December 30, 2011. We have amended the caption accordingly.

[2] During the pendency of these proceedings, Attorney Watson terminated his contract with Washington County, which provided for his representation of defendants in criminal proceedings, because he accepted a position with the
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This case stems from Appellant's convictions of one count each of possession with intent to deliver a controlled substance (seventeen marijuana plants) and simple assault.[3] The trial court summarized the factual history of this matter as follows:

> [O]n June 13, 2007, . . . North Strabane Township Police responded to a domestic dispute at [Appellant's] residence[.] . . . Upon arrival, police officers encountered the female victim, as well as her mother . . . and her sister.[4] [Appellant] was not present at the scene at that time, having fled prior to the arrival of the police officers. [Appellant] was later found on the hillside just above the residence and taken into custody. The victim was taken to Canonsburg Hospital for the injuries she had suffered as a result of the assault by [Appellant]. While at the hospital, [the victim's mother], who had accompanied the victim, informed the police officer that [Appellant] had marijuana plants growing and that she had seen those plants in [Appellant's] possession.
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> During [Appellant's June 25, 2008 bench] trial, North Strabane Township Police Officer [John] Wybranowski testified that in speaking to [the victim's mother] at the hospital, he was told that [Appellant] had been in possession of these marijuana plants and had put them in the Nissan truck that was parked at the residence. Officer Wybranowski thereafter obtained the consent of the property owners, [Appellant's] parents, to search

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state of Pennsylvania which did not permit him to provide such representation. Attorney Mary Rose Bates entered her appearance and continues to represent Appellant in this appeal. Prior counsel Attorney Watson has sought leave to withdraw from this Court, and his motion will be granted.

[3] 35 P.S. § 780-113(a)(30) and 18 Pa.C.S.A. § 2701(a)(1), respectively.

[4] Appellant's parents owned the residence. (***See*** N.T. PCRA Hearing, 8/26/11, at 55). The parents resided in Hawaii at the time of the incident, and Appellant lived at the residence with his girlfriend (the victim) and the victim's mother. (***See id.*** at 11-12).

> the premises. Upon a cursory search of the area, the marijuana plants were observed through the window of the Nissan truck parked at the residence. Further efforts were made to obtain the consent of the registered owner of the vehicle, [Appellant's stepmother]. When that could not be obtained, the police made application for a search warrant of the vehicle. Upon execution of the search warrant, 17 potted marijuana plants were found growing in the Nissan truck.
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> At trial, Appellant denied that he was the owner or that he had control of the truck or that he was in possession, constructive or otherwise, of the marijuana plants found within the truck. The truck was registered in [Appellant's stepmother's name], who at the time was a resident of Hawaii and had been living there since 2006. During the trial and in his post-sentence motions, [Appellant] referred to the truck as abandoned, and offered as a defense that he had no requisite degree of control over the vehicle, and that neither the vehicle nor its contents belonged to him. . . . [T]he [c]ourt found [Appellant] in constructive possession of the vehicle and its contents. The parents had not visited the area for over a year and had not lived on the premises since 2006; the truck had been in [Appellant's] possession on the premises since 2006; and [Appellant] had painted the truck and marked it with a decal bearing [Appellant's] nickname "the flying Hawaiian."
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> Officer Wybranowski further testified that the marijuana plants were obviously growing and being maintained, indicating that the plants were cared for on a regular basis. . . .

(Trial Court Opinion, 1/04/13, at 7-8 (record citations and footnote omitted)).

At the conclusion of Appellant's bench trial, the trial court found him guilty of the above-stated offenses. On July 1, 2008, the court sentenced Appellant to an aggregate term of not less than one and a half nor more than five years' incarceration. Appellant, through privately-retained trial

counsel, filed timely post-sentence motions on July 1, 2008, and July 11, 2008.

On December 8, 2008, trial counsel filed a motion for leave to withdraw as counsel for Appellant, and the trial court granted the motion on that same date. The court denied Appellant's post-sentence motions by order dated December 8, 2008, and entered on the docket on December 12, 2008. Appellant did not file a direct appeal.

On April 15, 2009, Appellant, acting *pro se*, filed the within PCRA petition. The PCRA court appointed Attorney Watson to represent Appellant, and counsel filed an amended petition on January 21, 2011. The court held a hearing on August 26, 2011, and entered its order denying Appellant's PCRA petition on December 30, 2011. This timely appeal followed.[5]

Appellant raises three issues for our review in his brief:

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[5] Appellant timely filed a Rule 1925(b) statement of errors on January 26, 2012, and the PCRA court filed a Rule 1925(a) opinion on January 4, 2013. ***See*** Pa.R.A.P. 1925.

We note that Appellant's four-page Rule 1925(b) statement is far from concise and is redundant given that eight of the thirteen issues he raised involve ineffective assistance of counsel claims for trial counsel's failure to file a motion to suppress. While the statement violates Pennsylvania Rule of Appellate Procedure 1925(b)(4)(iv), which requires **"non-redundant**, non-frivolous issues [to be] set forth in an appropriately **concise** manner," we decline to find waiver in this case. ***See*** Pa.R.A.P. 1925(b)(4)(iv)(emphasis added). The Rule 1925(b) statement adequately identifies the issues Appellant raises on appeal, and the trial court has addressed each issue in its Rule 1925(a) opinion.

1. Whether the [PCRA] [c]ourt erred/abused its discretion in denying [Appellant's] PCRA [p]etition, as amended, when it failed to find that trial counsel was ineffective?

2. Whether the [PCRA] [c]ourt erred/abused its discretion in denying [Appellant's] PCRA [p]etition, as amended, when it failed to find that trial counsel was ineffective in failing to preserve and file a direct appeal to the Superior Court and/or to preserve [Appellant's] direct appeal rights?

3. Whether the [PCRA] [c]ourt erred/abused its discretion in denying [Appellant's] PCRA [p]etition, as amended, when it failed to find that trial counsel was ineffective in failing to object to the hearsay testimony?

(Appellant's Brief, at 1).[6]

Our standard of review for an order denying PCRA relief is well-settled:

> This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted).

As a preliminary matter, we note that all of Appellant's issues on appeal allege ineffective assistance of trial counsel. To prevail on a petition for PCRA relief on grounds of ineffective assistance of counsel, "a petitioner must plead and prove, by a preponderance of the evidence, that his or her conviction or sentence resulted from . . . ineffectiveness of counsel . . .

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[6] We note that the Commonwealth did not file a brief.

which so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." ***Commonwealth v. Spotz***, 47 A.3d 63, 75-76 (Pa. 2012) (citing 42 Pa.C.S.A § 9543(a)(2)(i) and (ii)) (quotation marks omitted).

> It is well-established that counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him. . . . [O]ur Supreme Court [has] articulated a three-part test to determine whether an appellant has received ineffective assistance of counsel. Appellant must demonstrate that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) Appellant was prejudiced by counsel's act or omission.

Commonwealth v. Johnson, 51 A.3d 237, 243 (Pa. Super. 2012) (*en banc*), *appeal denied*, 63 A.3d 1245 (Pa. 2013) (citations and quotation marks omitted). In addition, "[an appellant's] failure to satisfy any prong of the ineffectiveness test requires rejection of the claim of ineffectiveness." ***Commonwealth v. Daniels***, 963 A.2d 409, 419 (Pa. 2009). We are also mindful that,

> [g]enerally, 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. . . . Regarding prejudice, it must be demonstrated that but for the act or omission in question, the outcome of the proceedings would have been different.

Commonwealth v. Hammond, 953 A.2d 544, 558-59 (Pa. Super. 2008), *appeal denied*, 964 A.2d 894 (Pa. 2009) (citations and quotation marks omitted).

In his first issue, Appellant claims that trial counsel was ineffective for failing to argue for suppression of evidence of the marijuana plants. (***See*** Appellant's Brief, at 4). Specifically, he alleges that the marijuana seized during the search of the Nissan truck should have been suppressed because the warrant obtained by police prior to the search was invalid. (***See id***. at 4-20). This issue is without merit.

Initially, we note that

> [u]nder Pennsylvania law, a defendant charged with a possessory offense has standing to challenge a search. To prevail in a challenge to the search and seizure, however, a defendant accused of a possessory crime must also establish, as a threshold matter, a legally cognizable expectation of privacy in the area searched. [I]t is clear that . . . a defendant cannot prevail upon a suppression motion unless he demonstrates that the challenged police conduct violated his own, personal privacy interests. The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all of the surrounding circumstances.

Commonwealth v. Caban, 60 A.3d 120, 126 (Pa. Super. 2012) (citations and quotation marks omitted).

Here, at the PCRA hearing, Appellant testified that he owned the truck in which the marijuana plants were found, that his parents gave it to him as a graduation gift in 2004, and that it was not operable at the time of the incident. (***See*** N.T. PCRA Hearing, 8/26/11, at 57-58). He testified that he had care, custody, and control of the truck, and that no one else exercised control over it. (***See id.*** at 59, 84). However, Appellant also acknowledged that, at his trial, his defense was that the truck was abandoned, that it did

not belong to him, and that he did not have care, custody, or control of it. (***See id.*** at 84). When questioned about this inconsistency in his testimony, he stated that whether or not the truck was his was "in the air because of [a] title issue" and that the truck was "physically [his] but legally that is questionable." (***Id.*** at 85).

At the PCRA hearing, trial counsel testified that he did not file a motion to suppress evidence because he did not believe there were any legitimate suppression issues. (***See id.*** at 14, 111). Counsel testified that, from the outset of the case, Appellant maintained that his parents owned the truck, and that he had not used it in a long time. (***See id.*** at 14, 18, 24). Counsel further testified that part of Appellant's argument at trial was that truck had been abandoned; its tires were flat and it had not been moved. (***See id.*** at 12).

The PCRA court concluded that counsel had no reason to pursue a motion to suppress because:

> . . . throughout [Appellant's] trial and post-sentence proceedings, [he] maintained that the [truck] was not his vehicle, that it had belonged to his stepmother but it had been abandoned, and that he had no care, custody or control over the vehicle. . . . [D]uring the PCRA hearing, [Appellant] admitted that he had changed his position and had changed his testimony from that of the bench trial. It was only during the PCRA proceedings that [Appellant] was claiming that the [truck] was his vehicle and that it was searched without his permission and consent.

(PCRA Ct. Op., 1/04/13, at 11-12).

Based on this record, we agree with the court's conclusion that there is no arguable merit to Appellant's claim that trial counsel should have pursued a motion to suppress, which would have required Appellant to establish a reasonable expectation of privacy in the truck and its contents. ***See Caban, supra*** at 126. The record indicates that, prior to the PCRA proceedings, Appellant consistently disclaimed ownership or control of the truck, he told counsel that the truck had been abandoned, and his position was that neither the truck nor the marijuana plants in it belonged to him. Accordingly, Appellant's first claim fails.

In his second issue, Appellant claims that trial counsel was ineffective for failing to file a direct appeal. (***See*** Appellant's Brief, at 20). Specifically, Appellant asserts he instructed counsel to file his appeal and that counsel "did not file for leave to withdraw from representing [him] . . . during the time period allowed to file an appeal." (***Id.***). We disagree, and note that,

> following conviction, trial counsel must, in order to be effective, go one step further in order to protect his client's right of appeal: either by filing the appeal, by recommending to the client other counsel to handle the appeal, **or by presenting to the court a motion to withdraw from the case**. In the case of withdrawal, the attorney should . . . immediately notify the client of such action in time for the client to secure other counsel.

Commonwealth v. Ross, 432 A.2d 1073, 1075-76 (Pa. Super. 1981) (emphasis added). "Ordinarily, . . . [b]efore a court will find ineffectiveness of counsel for failing to file a direct appeal, the defendant must prove that he requested an appeal and that counsel disregarded that request."

Commonwealth v. McDermitt, 66 A.3d 810, 814 (Pa. Super. 2013) (citation and internal quotation mark omitted). In addition, counsel has a constitutional duty to consult with a defendant about an appeal where there is reason for counsel to think that a defendant would want to appeal. ***See id.*** at 815.

Here, at the PCRA hearing, Appellant testified that, immediately after the trial court found him guilty on June 25, 2008, he told counsel that he wanted to appeal his case, and counsel agreed to file an appeal. (***See*** N.T. PCRA Hearing, 8/26/11, at 65, 67). However, Appellant also acknowledged receiving a letter from counsel, dated July 28, 2008, enclosing the post-trial motion counsel filed and advising Appellant that: (1) their original fee agreement did not cover post-trial motions or an appeal; (2) Appellant had an outstanding balance for the trial work; and (3) any post-trial work would be billed at counsel's regular hourly rate. (***See id.*** at 77-78; ***see also*** PCRA Petition, 4/15/09, at Exhibit B). When questioned whether the outstanding balance referenced in the letter was ever paid, Appellant testified that he did not know. (***See*** N.T. PCRA Hearing, 8/26/11, at 78-79).

Trial counsel testified that his original fee agreement with Appellant did not cover an appeal, that he had notified Appellant from the outset of his representation that he would not file an appeal, and that Appellant never asked him to file an appeal. (***See id.*** at 88, 91, 109). Counsel explained that his general practice is to represent his clients in the trial court only, not at the appellate level, and that he makes this clear to all of his clients. (***See***

id. at 88). He testified that he told Appellant that he would file post-sentence motions, but that his representation would end after that. (***See id.*** at 89). Counsel further testified that, after he sent Appellant the July 28, 2008 letter, he and Appellant had a telephone conversation during which he "informed [Appellant] that [he] had not been paid, that there would be no further representation[,] and for him to seek other representation." (***Id.*** at 89; ***see also id.*** at 108).

A review of the record reflects that on December 8, 2008, trial counsel petitioned the trial court for leave to withdraw from the case on the bases that the parties' fee agreement specifically stated that it did not cover an appeal, and Appellant had not made payments towards outstanding fees. (***See*** Motion for Leave to Withdraw, 12/08/08, at unnumbered page 3). Counsel informed the court that Appellant wanted to file an appeal, and that he had advised Appellant to seek other representation immediately due to the thirty-day filing deadline. (***See id.*** at unnumbered page 2).[7] The trial court permitted counsel to withdraw from the case on December 8, 2008, the same day that counsel filed his motion, and four days before the court's order denying Appellant's post-trial motions was entered on the docket.[8]

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[7] The accompanying certificate of service shows that Appellant was served with a copy of the motion.

[8] To the extent Appellant implies that trial counsel filed his motion to withdraw from representation after the thirty-day appeal period had expired (***see*** Appellant's Brief, at 20), his assertion is belied by the record, which
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The PCRA court determined that counsel was not ineffective for failing to file a direct appeal because Appellant: (1) did not request or expect counsel to file an appeal; (2) was aware of the filing deadline; and (3) chose not to pursue an appeal with other counsel. (***See*** Trial Ct. Op., 1/04/13, at 13).

Based on the foregoing, we conclude that trial counsel properly withdrew from the case, ***see Ross***, ***supra***, at 1075-76, and that he did not improperly disregard a requested appeal. ***See McDermitt***, ***supra*** at 814; ***see also Commonwealth v. Markowitz***, 32 A.3d 706, 717 (Pa. Super. 2011), *appeal denied*, 40 A.3d 1235 (Pa. 2012) (determining counsel was not ineffective for failing to file a direct appeal where appellant did not request an appeal and counsel's advice did not improperly cause appellant to forgo that right). The record supports the PCRA court's findings that Appellant was aware of the deadline for filing an appeal, and that he chose not to pursue an appeal with other counsel after trial counsel withdrew from his case. Appellant had ample time to secure other counsel to preserve his direct appeal rights, ***see Ross***, ***supra*** at 1075-76, and he neglected to do so. Accordingly, Appellant's second claim lacks merit.

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reflects that counsel filed the motion on December 8, 2008, well in advance of the January 12, 2009 deadline for filing a notice of appeal. ***See*** Pa.R.Crim.P. 720(A)(2)(a).

In his third issue, Appellant argues that trial counsel was ineffective for failing to object to inadmissible hearsay testimony. (***See*** Appellant's Brief, at 21-23). Specifically, he claims that admission of Officer John Wybranowski's testimony regarding a police crime laboratory report confirming that the plants at issue in this case were marijuana violated his Confrontation Clause rights. (***See id.***).

The PCRA court concluded that trial counsel had a reasonable basis for declining to object to the officer's testimony regarding the lab report, and that absence of an objection did not prejudice Appellant to the extent the outcome of the trial would have been different. (***See*** Trial Ct. Op., 1/04/13, at 13-14). We agree.

At the PCRA hearing, trial counsel testified that he did not object to Officer Wybranowski's testimony regarding the lab report because whether or not the plants were marijuana was never an issue in the case. (***See*** N.T. PCRA Hearing, 8/26/11, at 101). Counsel stated that Appellant had told him and the police that the plants were marijuana plants, and Appellant's defense at trial was that the plants did not belong to him. (***See id***. at 15, 17, 100-01, 106, 110). Counsel explained that he was provided with a copy of the lab report, that the report clearly verified that the plants were marijuana, and that to raise an objection and request that a chemist from the lab testify would only delay matters and would not be helpful to Appellant. (***See id.*** at 106-07).

Based on the foregoing, we agree with the PCRA court's determination that counsel had a reasonable basis for not objecting to the testimony at issue, and that counsel's inaction did not prejudice Appellant. ***See Hammond***, ***supra*** at 558-59. Appellant's final ineffective assistance of counsel claim fails.

Accordingly, for the reasons discussed above, we affirm the court's order denying Appellant's PCRA petition. Also, we grant the application of Attorney Jeffrey A. Watson to withdraw his appearance in this matter.

Order affirmed. Application of Jeffrey A. Watson to withdraw as counsel granted.

Judgment Entered.

Nicholas V. Cusatti

Deputy Prothonotary

Date: 8/9/2013