

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
MERION PACE	:	
	:	
Appellant	:	No. 2763 EDA 2019

Appeal from the PCRA Order Entered September 19, 2019
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0007475-2011

BEFORE: BENDER, P.J.E., LAZARUS, J., and STEVENS, P.J.E.*

MEMORANDUM BY BENDER, P.J.E.: **FILED: JANUARY 22, 2021**

Appellant, Merion Pace, appeals from the post-conviction court’s order denying his first, timely petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Appellant argues that his trial counsel acted ineffectively. After careful review, we affirm.

In April of 2013, a jury convicted Appellant of three counts of attempted murder, three counts of aggravated assault, possession of a firearm by a person prohibited, carrying a firearm without a license, and carrying a firearm in public in Philadelphia. His convictions stemmed from evidence that he fired a gun into a car containing three people, striking one of them. On September 9, 2013, Appellant was sentenced to an aggregate term of 25 to 50 years’ imprisonment. This Court affirmed his judgment of sentence on March 24,

* Former Justice specially assigned to the Superior Court.

2015. **Commonwealth v. Pace**, 120 A.3d 1061 (Pa. Super. 2015) (unpublished memorandum). Appellant did not file a petition for allowance of appeal with our Supreme Court.

On December 2, 2015, Appellant filed a *pro se* PCRA petition. Counsel was appointed and filed an amended petition seeking, *inter alia*, reinstatement of Appellant's right to file a petition for allowance of appeal with our Supreme Court. The PCRA court granted Appellant's petition and he appealed to the Supreme Court *nunc pro tunc*. On February 26, 2018, the Court denied his petition for allowance of appeal. **Commonwealth v. Pace**, 182 A.3d 432 (Pa. 2018).

On August 9, 2016, Appellant filed the *pro se* PCRA petition underlying his present appeal. The court appointed counsel, who filed an amended petition on Appellant's behalf. The Commonwealth subsequently filed a motion to dismiss Appellant's petition. On August 20, 2019, the PCRA court issued a Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition without a hearing. He did not respond, and by order filed on September 19, 2019, the court dismissed his petition.

Appellant filed a timely notice of appeal. It does not appear that the court ordered him to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal, but it filed a Rule 1925(a) opinion on December 19, 2019. Herein, Appellant states one issue for our review: "Did the [PCRA] court err, abuse its discretion, and/or make a mistake of law when it denied

Appellant's [PCRA] ... petition for relief, on September 19, 2019, without an evidentiary hearing?" Appellant's Brief at 2.

Although Appellant presents a single issue in his Statement of the Questions Involved, his Argument contains two distinct ineffective-assistance-of-counsel claims: (1) that his "[t]rial counsel failed to convey a plea offer to [Appellant] that was or would have been more favorable than the sentence finally imposed[,]" *id.* at 10; and (2) that "Appellant was greatly prejudiced when trial counsel failed to move for a mistrial after a juror told the trial judge he felt 'strange' after encountering Appellant outside the courthouse[] during the jury trial[,]" *id.* at 11. We will address each of Appellant's ineffectiveness claims in turn.

Initially, we note that, "[t]his Court's standard of review from the grant or denial of post-conviction relief is limited to examining whether the lower court's determination is supported by the evidence of record and whether it is free of legal error." ***Commonwealth v. Morales***, 701 A.2d 516, 520 (Pa. 1997) (citing ***Commonwealth v. Travaglia***, 661 A.2d 352, 356 n.4 (Pa. 1995)). Where, as here, a petitioner claims that he received ineffective assistance of counsel, our Supreme Court has stated that:

[A] PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the "[i]neffective assistance of counsel 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." Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner. To obtain relief, a petitioner must demonstrate

that counsel's performance was deficient and that the deficiency prejudiced the petitioner. A petitioner establishes prejudice when he demonstrates "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ... [A] properly pled claim of ineffectiveness posits that: (1) the underlying legal issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice befell the petitioner from counsel's act or omission.

Commonwealth v. Johnson, 966 A.2d 523, 532-33 (Pa. 2009) (citations omitted).

Here, in support of his first ineffectiveness claim, Appellant argues:

Trial counsel failed to convey a plea offer to [Appellant] that was or would have been more favorable than the sentence finally imposed. [Appellant] claims his trial attorney conveyed the outline of an offer received from the Commonwealth in which the minimum was less than 25 years. Moreover, because trial counsel failed to discuss this potential agreement in detail[,] and did not obtain an official Smart Room Offer[,] ... Appellant was left without an avenue to understand the actual offer conveyed, which would have also contained the statutory sentence minimums, maximums, and any applicable mandatory-minimum[] terms. By not providing these materials to ... Appellant[,] and not discussing the likely sentencing scores, especially related to the offense gravity and prior record score, [counsel] placed him into a precarious position lacking fundamental knowledge. Without knowledge about a likely sentence range[,] ... Appellant was unable to mak[e] a knowing, intelligent, and ultimately voluntary decision about how his case would proceed. There was no strategic purpose or reason for withholding this information, and but for counsel's omission in not conveying this information, including the Commonwealth's complete offer, [and] statutory maximum, there exists a strong probability the proceeding would have concluded differently.

Appellant's Brief at 10-11.

Notably, Appellant offers no legal authority to support his argument that counsel acted ineffectively regarding the Commonwealth's purported plea

offer. “When briefing the various issues that have been preserved, it is an appellant’s duty to present arguments that are sufficiently developed for our review. The brief must support the claims with pertinent discussion, with references to the record and with citations to legal authorities. ... [W]hen defects in a brief impede our ability to conduct meaningful appellate review, we may dismiss the appeal entirely or find certain issues to be waived.” ***Commonwealth v. Hardy***, 918 A.2d 766, 771 (Pa. Super. 2007).

While we can meaningfully review Appellant’s claim, despite his briefing defects, his unsupported argument does not convince us that the PCRA court erred in dismissing his first assertion of ineffectiveness. In ***Commonwealth v. Copeland***, 554 A.2d 54 (Pa. Super. 1988), this Court stated that, to prove ineffectiveness for failing to convey a plea offer, the petitioner must prove that:

(1) an offer for a plea was made; (2) trial counsel failed to inform him of such offer; (3) trial counsel had no reasonable basis for failing to inform him of the plea offer; and (4) he was prejudiced thereby.

Id. at 61.

Appellant did not plead sufficient facts in his petition to prove these four requirements.¹ In his *pro se* and amended petitions, Appellant baldly claimed

¹ Appellant mentions, in his Summary of the Argument, that “an evidentiary hearing ... should have been ordered” in this case. Appellant’s Brief at 6. Aside from that remark, however, he does not develop any argument that there are material issues of fact warranting a hearing. ***See Commonwealth v. Fears***, 86 A.3d 795, 823 (Pa. 2014) (“A PCRA court has discretion to dismiss a

that his trial counsel did not convey a plea offer to him, but offered nothing to substantiate this assertion. For instance, Appellant did not “provide[] an affidavit from trial counsel or some other source with first-hand knowledge conceding that a plea offer was actually made.” Commonwealth’s Brief at 9. At a minimum, Appellant could have stated how and when he discovered the ostensible offer, and explained what terms it contained, but he failed to do so. Therefore, we discern no error or abuse of discretion in the PCRA court’s denying Appellant’s unsupported allegation of ineffective assistance of counsel. Moreover, to the extent Appellant now changes his argument, contending that counsel *did convey* a plea offer to him, but did not adequately explain it or advise Appellant of the possible sentence he could receive if he proceeded to trial, he has waived this claim by failing to raise it below. **See** Pa.R.A.P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”).

In Appellant’s next ineffectiveness issue, he argues that his trial counsel erred by not moving “for a mistrial after a juror told the trial judge he felt ‘strange’ after encountering ... Appellant outside the courthouse, during the jury trial.” Appellant’s Brief at 11. Appellant explains:

While on bail, ... Appellant was on trial and at some point, during its pendency, [he] had contact outside the courtroom with Juror 12. Juror 12 told the trial judge: “I did not speak with him. We passed on the street and I side stepped. He was going one way,

petition if it is satisfied there are no genuine issues concerning any material fact or any other legitimate purposes for an evidentiary hearing.”).

I was going the other. I kept going up the block. I went into the store and [Appellant] came into the store pretty much right behind me. I went to the back of the store and tried to avoid him. And he left. I don't know if he bought anything. I don't know what was going on. From the talk of the rest of the jury, everybody else had an encounter with him[,] too. I don't think anybody spoke with him. But they ran into him at McDonald's, at The Gallery, so on and so forth. It seems like every juror." The trial court expressed concern about this meeting and asked the juror if this was an "inadvertent contact[,] [t]o which Juror 12 replied[,] "And I don't know - he did not try to speak with me. We didn't make eye contact. It was just strange."^[2]

Although it seemed as if [Appellant] had been following the juror and perhaps following all of the jurors, the [c]ourt said[,] "[W]e'll leave it where it is. This juror, in my opinion is okay to continue."^[3] Defense counsel did not object. Defense counsel failed to ask for a colloquy of the other jurors to see if they had become tainted. While incidental contact can be innocently had[,] especially where the [d]efendant is on bail, a juror, many of whom are tense to begin with, would surely [have] had to be worried if the juror perceived that [Appellant] was following or even stalking them while they were in Center City. [Appellant] was not engaged in that activity but, it is not what [Appellant] was doing that is relevant[,] but rather it is the perception of each juror that is relevant, and the [c]ourt failed to ask for that. The only indication of what the other jurors felt was the words of Juror ... 12[,] who indicated that the other jurors felt that they were having contact with [Appellant,] as well. Trial counsel [was] ineffective for not objecting and asking for a mistrial, based on Juror 12's statements[,] as it is clear from these statements to the trial court[] [that] each and every juror discussed this case prior to deliberations, and, without the trial court's permission, and also without informing the court. Trial counsel was ineffective for not requesting a mistrial. Trial counsel lacked a rational and/or reasonable basis for failing to ask for a mistrial and/or ask to colloquy every juror. The only possible remedy currently is the granting of a new trial to this [Appellant,] as the jurors spoke about [Appellant] and [the] case prior to being charged by the judge and sent to deliberate.

² N.T. Trial, 4/11/13, at 143.

³ *Id.* at 145.

Appellant's Brief at 11-13 (citations to the record and emphasis omitted).

Appellant's argument is unconvincing. As with his first issue, he provides no legal authority to support his argument that a mistrial would have been granted, had defense counsel moved for it. "A mistrial is an extreme remedy and is required only when the incident is of such nature that the unavoidable effect is to deprive the petitioner of a fair trial." **Commonwealth v. Montalvo**, 641 A.2d 1176, 1188 (Pa. Super. 1994); **see also Commonwealth v. Johnson**, 815 A.2d 563, 576 (Pa. 2002) ("Mistrials should be granted only when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial.") (citations omitted).

Here, the PCRA court found that a mistrial would not have been granted because "there was no evidence that a prejudicial event had taken place...." PCRA Court Opinion, 12/19/19, at 7. The court noted that "[t]he juror admitted that neither he, nor any other member of the jury, actually spoke to [Appellant]. The trial court decided that because none of the jurors conversed with [Appellant], no prejudice resulted." **Id.** Appellant does not counter the court's reasoning with any developed discussion of why the jurors' seeing him outside the courtroom was prejudicial. Instead, he only cursorily suggests that Juror 12's comment that it was 'strange' to see Appellant indicated that the juror believed Appellant had been following him. Appellant's interpretation of the juror's remark is speculative, and wholly insufficient to demonstrate the significant prejudice that would warrant a mistrial.

Moreover, Juror 12 explained that he and Appellant did not even make eye contact, much less speak. Obviously, then, there was no communication about the case. Additionally, Juror 12 said nothing that would suggest that he and the other jurors discussed the trial; instead, they spoke only about their sightings of Appellant outside the courthouse. In the court's opening jury instruction, it informed the jurors that they "cannot talk to each other about the evidence, about the case[,], or any matters about how the trial is going. ... [D]o not discuss the case among yourselves or with anybody else." N.T. Trial, 4/11/13, at 15. Nothing in Juror 12's statements to the court indicates that the jurors failed to follow this instruction.

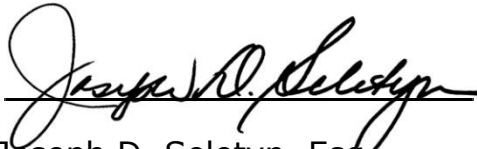
Appellant also does not discuss what the other jurors might have said, had they been colloquied. Since he was involved in these alleged encounters with the jurors, he would surely know if a juror would have revealed that more occurred than just a brief sighting of him. In that case, defense counsel would have acted reasonably by not seeking to reveal to the court and the Commonwealth that Appellant said or did something that could be viewed as threatening or tampering with the jury. On the other hand, if only non-contact sightings occurred, as with Juror 12, then we fail to see what prejudice Appellant suffered by the court's not questioning the jury about those encounters.

In sum, Appellant's legally unsupported argument that he was denied a fair trial because jurors saw him outside the courtroom, and then spoke to one another about those sightings, fails to demonstrate that he was prejudiced

by trial counsel's decision not to move for a mistrial or request further colloquy of the jurors. Furthermore, Appellant's bald allegation in his PCRA petition, that his trial counsel failed to convey a plea offer to him, was insufficient to demonstrate counsel's ineffectiveness. Accordingly, we discern no abuse of discretion or error of law in the PCRA court's denying his petition.

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: 1/22/21