J. S01009/14

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
TIMOTHY GRIFFIN,	:	No. 150 WDA 2013
Appellant	:	

Appeal from the PCRA Order, November 26, 2012,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0017371-2006

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: April 22, 2014

Appellant appeals, ***pro se***, from the order dismissing his first petition filed pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. Finding no error, we will affirm.

On February 4, 2009, a jury found appellant guilty of possession of a controlled substance, possession of a controlled substance with intent to deliver, and possession of drug paraphernalia. The charges arose from an incident in Pittsburgh on August 5, 2006. At that time, police approached appellant because he was seen drinking from an open beer can on a public street. Appellant fled, and when he was caught, he was found to have crack cocaine and a small drug scale on his person.

On April 21, 2009, appellant was sentenced to 5 to 10 years' imprisonment. On April 1, 2010, counsel for appellant, Alan Ross

Patterson III, Esq.,[1] filed a motion to supplement the record with photographs of the evidence entered at trial. (Record Document No. 96.) Among the photographs included in this filing was Image 563, a photograph depicting the weighing surface of the electronic scale found on appellant. On May 27, 2011, this court affirmed the judgment of sentence. ***Commonwealth v. Griffin***, 30 A.3d 551 (Pa.Super. 2011) (unpublished memorandum).

On May 16, 2012, appellant filed the instant PCRA petition. Following a ***Grazier*** hearing,[2] on July 13, 2012, the PCRA court entered an order permitting appellant to represent himself. On October 11, 2012, the PCRA court entered an order giving appellant notice, pursuant to Pa.R.Crim.P., Rule 907, 42 Pa.C.S.A., of the court's intention to dismiss the petition without hearing. On October 29, 2012, appellant responded with a motion for recusal. On November 26, 2012, the PCRA court denied the motion for recusal and dismissed the PCRA petition. This timely appeal followed.

We are able to glean the following issues from appellant's rambling, often incoherent brief. First, appellant asserts that the PCRA court erred in denying the motion for recusal. Second, appellant asserts that Attorneys Horowitz and Patterson were ineffective by acting "in covin" to

[1] Attorney Patterson represented appellant at sentencing and on direct appeal until this court permitted him to withdraw. Trial counsel was Joseph Horowitz, Esq.

[2] ***Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998).

cover-up Attorney Horowitz's failure to call certain witnesses at trial. Third, appellant maintains that Attorney Patterson was ineffective in filing the April 1, 2010 motion to supplement the record as he was engaging in "covin and collusion" with the district attorney to tamper with evidence.[3]

Our standard of review for an order denying post-conviction relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. ***Commonwealth v. Franklin***, 990 A.2d 795, 797 (Pa.Super. 2010). The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. ***Id.***

Moreover, as two of appellant's issues on appeal are stated in terms of ineffective assistance of counsel, we also note that appellant is required to make the following showing in order to succeed with such a claim: (1) that the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or inaction; and (3) that, 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. Rivera***, 10 A.3d 1276, 1279 (Pa.Super. 2010). The failure to satisfy any prong of this test will cause the entire claim to fail. ***Commonwealth v.***

[3] We note with disapproval that appellant's second and third issues are not described in detail in the brief but are instead presented essentially by reference to the pages of his PCRA petition where each is described in detail. (***See*** appellant's brief at 47, 51.)

Daniels, 947 A.2d 795, 798 (Pa.Super. 2008). Finally, counsel is presumed to be effective, and appellant has the burden of proving otherwise. ***Commonwealth v. Pond***, 846 A.2d 699, 708 (Pa.Super. 2003).

In appellant's first issue, he claims that the PCRA court, Judge Joseph K. Williams, III, erred in denying his motion to recuse.

> Our standard of review of a trial court's determination not to recuse from hearing a case is exceptionally deferential. We recognize that our trial judges are "honorable, fair and competent," and although we employ an abuse of discretion standard, we do so recognizing that the judge himself is best qualified to gauge his ability to preside impartially. ***Commonwealth v. Abu-Jamal***, 553 Pa. 485, 720 A.2d 79, 89 (1998).
>
> > As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a personal and unreviewable decision that only the jurist can make.
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> ***Id.*** (citations omitted). Accordingly, a party seeking to compel a judge's disqualification must "produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially." ***Id.***

Commonwealth v. Bonds, 890 A.2d 414, 418-419 (Pa.Super. 2005), appeal denied, 588 Pa. 774, 906 A.2d 537 (2006). Moreover, "[a]dverse rulings alone do not, however, establish the requisite bias warranting recusal, especially where the rulings are legally proper." ***Abu-Jamal***, 553 Pa. at 508, 720 A.2d at 90.

We have reviewed appellant's motion for recusal. All of appellant's accusations of bias pertain to adverse rulings. For instance, appellant complains that Judge Williams' prejudice and unfairness is easily discerned by the Rule 907 notice suggesting that his petition be dismissed without a hearing. (Motion for Recusal, 10/29/12 at 1.) We note that Rule 907 notice is intended as a boon to the petitioner to provide an opportunity for the petitioner to argue why the petition should not be dismissed without hearing. In giving Rule 907 notice, the trial court is acting to the petitioner's benefit.

Appellant also finds bias in Judge Williams' calculation of the Rule 907 run date:

> 10. The last attempt to deny fundamental fairness in this proceeding, Judge Williams stated, "Any response must be filed no later than Nov. 7, 2012". Notice to Dismiss, p. 3. Judge Williams [sic] order/Notice to dismiss was filed Oct. 11, 2012, giving, petitioner 20 days to respond. By any calculation, Judge Williams [sic] Nov. 7, 2012, deadline is wrong and, petitioner takes this another attempt to deprive, petitioner of his cause of action.

Id. at 12.

Rule 907 provides that the petitioner may respond to the notice within 20 days. ***See*** Rule 907(1). The run date Judge Williams set provided appellant 26 days to respond to the notice, giving appellant an extra six days. Appellant suggests that this is evidence that Judge Williams was biased against him. To the contrary, we find that in granting appellant extra time to file his response, this factor would indicate that Judge Williams was being more than fair.

Appellant also asserts that the Rule 907 notice did not indicate why certain fraud claims raised in the petition were without merit. Appellant argues that if these arguments were defective, Judge Williams showed bias in failing to indicate the defects and order that the petition be amended pursuant to Pa.R.Crim.P., Rule 905(B), 42 Pa.C.S.A.

Actually, the Rule 907 notice did not find that the fraud argument was defective; rather, it found that the fraud claim was based upon the alleged use of false evidence at trial and that this issue was litigated on direct appeal. (Memorandum Opinion & Order, 10/11/12, at 1-2.) Thus, the court concluded that to the extent appellant's false evidence claims were raising those earlier arguments, they were previously litigated; and to the extent that the false evidence claims were raising new arguments, they were waived. The court was thereby following the proscription in the PCRA prohibiting review of matters previously litigated, or of matters that could have been previously litigated, but were not and are waived. ***See***

42 Pa.C.S.A. §§ 9543(a)(3); 9544. Previous litigation or waiver under Sections 9543 and 9544 is not a curable defect, and Judge Williams did not show bias in failing to direct appellant to amend the petition.[4]

In sum, there is absolutely no indication in the record as to bias on the part of Judge Williams; and as noted before, adverse rulings, in and of themselves, will not support a claim of bias. There is no merit here.

In his second claim of error, appellant contends that Attorneys Horowitz and Patterson were ineffective in plotting to cover-up the fact that Attorney Horowitz failed to call certain witnesses at trial. We see no indication of collusion on the part of Attorney Patterson on this issue. In point of fact, during the hearing on post-sentence motions, Attorney Patterson did ask Attorney Horowitz why he failed to call certain witnesses:

> Q. Did Mr. Griffin bring to your attention witnesses that he would like to have called?
>
> A. He did; but we decided together that since we were pursuing this particular defense, that we weren't going to call any of those witnesses. His witnesses were basically - - I think his original game plan was to say all the evidence was planted on him. It was my opinion that wouldn't be going over very well with a jury, that we did have a real issue with the Crime Lab and the bags being different that we should focus on. He agreed.

[4] We note in passing that appellant's PCRA petition contained other fraud claims that the Rule 907 notice simply did not address. However, there is no indication that Judge Williams found these claims to be defectively presented, requiring Rule 905 amendment, rather than merely meritless and not requiring Rule 905 amendment. There is no indication of bias in this.

Notes of testimony, 9/8/09 at 40-41.

Appellant counters that Attorney Patterson knew this testimony was "patently false" but made no effort to resist or confront the testimony. Appellant argues that these witnesses were not going to testify that the evidence was planted on him.

We find that appellant was unable to prove he was prejudiced by the conduct of either Attorney Horowitz or Attorney Patterson. Appellant named five witnesses in his PCRA petition that Attorney Horowitz failed to call at trial: Alonzo Grier, Mia Gray, Mrs. J. Cooper, Michael Ayoob, and Elizabeth Pittinger. (PCRA petition, record document 119 at 18-19.) In order to prove Attorney Patterson's ineffectiveness in failing to challenge Attorney Horowitz as to why he did not call them, appellant would need to present these witnesses at an evidentiary hearing. However, at no point in his original PCRA petition did appellant provide a signed certification as to the proposed testimony of these witnesses as he needed to do to merit an evidentiary hearing on this issue. ***See*** 42 Pa.C.S.A. § 9545(d)(1). Eventually, in an amended PCRA petition filed July 6, 2012, appellant did file a signed certification as to witnesses, but in that certification, appellant mentioned only Mrs. J. Cooper. Thus, appellant's petition is inadequate to require an evidentiary hearing where he could present any of the other witnesses and prove a claim that either Attorney Horowitz or Attorney Patterson was ineffective in failing to call these witnesses.

As for Mrs. J. Cooper, appellant asserts that he wanted to use her at trial to establish his welfare status. (PCRA petition, record document 119 at 18-19.) Such testimony would have been completely irrelevant to the matters germane to appellant's criminal trial. While we cannot discern appellant's intended purpose for this evidence, we note that appellant's welfare status would in no way disprove that he possessed a large sum of money from dealing drugs. The testimony of Mrs. J. Cooper would not have been admissible at appellant's trial as irrelevant and he was not prejudiced by the failure to call her.

In sum, we see no indication of any plot between Attorneys Horowitz and Patterson against appellant. We find no merit to the claim underlying appellant's assertion of ineffectiveness that Attorney Patterson failed to adequately explore and attack Attorney Horowitz's failure to call certain witnesses. Attorney Patterson did so to the best of his ability by presenting appellant's testimony. There is no indication that any witnesses other than appellant was available to counter Attorney Horowitz's testimony. Thus, there is no ineffectiveness here.

In his third issue, appellant maintains that Attorney Patterson was ineffective in filing the April 1, 2010 motion to supplement the record as he was engaging in "covin and collusion" with the district attorney to tamper with evidence. Specifically, appellant points to one of the photographs appended to the motion to supplement the record, "Image 563." Image 563

depicts the weighing surface of the electronic scale seized from appellant. According to appellant, when presented at trial, the face of the scale had a lot of very small chunks of crack cocaine residue on the weighing surface of the scale. (Notes of testimony, 2/3-4/09 at 56-57.) However, in the Image 563 photograph, there are no visible chunks of crack cocaine, but only a very limited, powdery white residue. Appellant argues that if Image 563 is a truthful representation, then what was presented at trial must have been falsified.

We find appellant's argument to be absurd. First, this issue does not indicate ineffectiveness of counsel. Attorney Patterson only prepared the motion to supplement the record, he did not partake in appellant's trial and could not have falsified what was presented there. Appellant may be attempting to paint his falsified evidence claim in the guise of ineffective assistance to avoid the previous litigation/waiver problem discussed earlier, but it will not work here because Attorney Patterson was not trial counsel and could not have participated in the falsifying of evidence or in acquiescing to it.

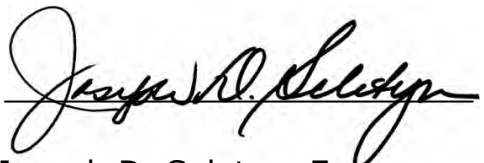
Second, the present condition of the electronic scale is no indication that what was presented at trial was falsified. Rather, it only indicates that the amount of cocaine residue on the scale may have deteriorated from the time of trial until it was photographed and included in the motion to supplement the record. While it may be true, as appellant contends, that

the court ordered that the evidence be preserved, such preservation is not always done with exacting perfection. In sum, we see no indication here that what was presented at trial was in any way falsified.

Accordingly, having found no merit in the issues raised on appeal, we will affirm the order below.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014