

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

EVERETT EDWARDS

Appellant

No. 1094 EDA 2013

Appeal from the PCRA Order entered April 5, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division at No: CP-51-CR-1303630-2006

BEFORE: ALLEN, STABILE, AND STRASSBURGER,*JJ.

MEMORANDUM BY STABILE, J.:

FILED APRIL 23, 2014

Appellant Everett Edwards appeals from the order of the Court of Common Pleas of Philadelphia County entered April 5, 2013 dismissing his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46 (PCRA). After review, we affirm.

As we are writing for the parties, we will not reiterate the underlying facts here as they were adequately stated in our unpublished memorandum filed in connection with the direct appeal. **See *Commonwealth v. Edwards***, 761 EDA 2008 (unpublished memorandum) (Pa. Super. 2009). Briefly, Appellant was involved in a violent confrontation with a group of people, which resulted in serious bodily injuries to victim. Defendant pled

* Retired Senior Judge assigned to the Superior Court.

guilty to three counts of aggravated assault, one count of simple assault, one count of possession of an instrument of crime (PIC), and one count of criminal attempted murder in exchange for a sentence of seven to twenty years' imprisonment. Approximately two months later, Appellant, through new counsel, moved to withdraw his guilty plea alleging, *inter alia*, he did not have sufficient time to consult with former counsel and former counsel did not properly inform him of the consequences of the plea. **See** Appellant's Motion to Withdraw Guilty Plea Prior to Sentencing, 8/3/07, at 2. The trial court granted the motion, and Appellant proceed to a jury trial.

After trial, the jury found Appellant guilty of aggravated assault and PIC, but not of attempted criminal murder (and other counts, not relevant here). The trial court sentenced Appellant to ten to twenty years of incarceration on the aggravated assault conviction, and two and a half to five years of incarceration on the PIC conviction. Because Appellant had been previously convicted of aggravated assault, the trial court imposed the mandatory minimum sentence pursuant to 42 Pa.C.S. § 9714(a)(1).

Appellant timely appealed to this Court. On direct appeal, Appellant, through new counsel, argued trial counsel was ineffective for failing to seek a self-defense charge and for failing to challenge the excessive sentence imposed on the PIC conviction. We affirmed the judgment of sentence, noting the issue of ineffective assistance of counsel could not be addressed on direct appeal and the discretionary aspects of the sentence challenge was waived for failure to file a Pa.R.A.P. 2119(f) statement.

Appellant then filed a timely PCRA petition, which was subsequently amended and supplemented by PCRA counsel. The trial court denied the petition without holding a hearing. This appeal followed.

On appeal, Appellant raises the following issues:

- I. Did the trial court err in not reinstating [A]ppellant's rights *nunc pro tunc* from the judgment of sentence?
- II. Did the trial court err in denying the [A]ppellant an evidentiary hearing on the allegations of trial defense counsel ineffectiveness?

Appellant's Brief at 2.

Despite the fact Appellant is represented by counsel, it is not easy to figure out what Appellant actually raises before this Court. As the trial court did below, we often also have to guess at what is Appellant's argument. In his first issue, Appellant seems to raise a claim of ineffective assistance of direct appeal counsel.¹ He argues direct appeal counsel failed to (i)

¹ As noted, Appellant argues the trial court erred in not reinstating "his rights" *nunc pro tunc*. Appellant's Brief at 2 (citing **Commonwealth v. Lantzy**, 736 A.2d 564 (Pa. 1999)).

We believe Appellant has mischaracterized his first issue as one reinstating appellate rights *nunc pro tunc*. "[A]n appeal *nunc pro tunc* is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances." **Commonwealth v. Stock**, 679 A.2d 760, 764 (Pa. 1996). **Lantzy**, in fact, deals with the restoration of appellate rights *nunc pro tunc* as a remedy for counsel's ineffectiveness for failing to file a direct appeal, which is not the case here. Additionally, Appellant failed to provide any authority for the proposition a waiver of a challenge to the discretionary aspects of the sentence would result in reinstating his appellate rights. In fact, case law supports the opposite proposition. **See, e.g., Commonwealth v. Mikell**, 968 A.2d 779, 781 (Pa. (Footnote Continued Next Page)

challenge the discretionary aspects of the sentence and (ii) challenge the sufficiency of the evidence regarding the aggravated assault conviction. Regarding the second issue, Appellant challenges the effectiveness of trial counsel. According to Appellant, trial counsel was ineffective for (i) recommending withdrawal of his guilty plea and to proceed to trial and (ii) not requesting a self-defense charge. We will address these issues *ad seriatim*.

In addressing Appellant's claims of ineffective assistance of counsel, we employ the following standards:

"To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." ***Commonwealth v. Chmiel***, 612 Pa. 333, 30 A.3d 1111, 1127 (2011). Where the petitioner "fails to plead or meet any elements of the above-cited test, his claim must fail." ***Commonwealth v. Burkett***, 5 A.3d 1260, 1272 (Pa. Super. 2010).

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Super. 2009), *appeal denied*, 985 A.2d 971 (Pa. 2009) ("[I]t is also well-settled that the reinstatement of direct appeal rights is not the proper remedy when appellate counsel perfected a direct appeal but simply failed to raise certain claims.")

Despite how the issue was phrased, a review of the brief reveals Appellant intended to challenge direct appeal counsel's performance regarding two discrete issues, *i.e.*, whether he failed to challenge the discretionary aspects of the sentence and the sufficiency of the evidence supporting his aggravated assault conviction.

A claim has arguable merit where the factual averments, if accurate, could establish cause for relief. **See Commonwealth v. Jones**, 583 Pa. 130, 876 A.2d 380, 385 (2005) (“if a petitioner raises allegations, which, even if accepted as true, do not establish the underlying claim ..., he or she will have failed to establish the arguable merit prong related to the claim”). Whether the “facts rise to the level of arguable merit is a legal determination.” **Commonwealth v. Saranchak**, 581 Pa. 490, 866 A.2d 292, 304 n. 14 (2005).

The test for deciding whether counsel had a reasonable basis for his action or inaction is whether no competent counsel would have chosen that action or inaction, or, the alternative, not chosen, offered a significantly greater potential chance of success. **Commonwealth v. Colavita**, 606 Pa. 1, 993 A.2d 874 (2010). Counsel’s decisions will be considered reasonable if they effectuated his client’s interests. **Commonwealth v. Miller**, 605 Pa. 1, 987 A.2d 638 (2009). We do not employ a hindsight analysis in comparing trial counsel’s actions with other efforts he may have taken. **Id.** at 653.

“Prejudice is established if there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. **Commonwealth v. Steele**, 599 Pa. 341, 961 A.2d 786, 797 (2008). A reasonable probability ‘is a probability sufficient to undermine confidence in the outcome.’ **Commonwealth v. Rathfon**, 899 A.2d 365, 370 (Pa. Super. 2006).” **Burkett**, *supra* at 1272; **Strickland v. Washington**, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Commonwealth v. Stewart, 84 A.3d 701, 706-07 (Pa. Super. 2013).

With these standards in mind, we now review Appellant’s claims. Appellant first argues direct appeal counsel was ineffective for failing to challenge the discretionary aspects of the sentence.² A review of Appellant’s

² As we noted on direct appeal, counsel’s failure to file a Pa.R.A.P. 2119(f) statement resulted in Appellant’s waiver of challenges to discretionary aspects of sentence (on direct appeal, Appellant raised an excessive sentence claim regarding his PIC conviction).

brief, along with our memorandum issued on direct appeal, and trial court's opinion, seems to suggest Appellant is not arguing direct appeal counsel should have challenged the imposition of the mandatory sentence, but only the trial court's imposition of a sentence on the PIC conviction deviating upward from the sentencing guidelines. Appellant fails to allege and prove this claim is meritorious or the actual prejudice he suffered from the alleged ineffectiveness. As the trial court noted, the sentencing guidelines are advisory and a trial court, in exercising its discretion, may deviate from guideline ranges as long as it is aware of the guidelines and states on the record the factual basis and specific reasons for departing from them. **See Commonwealth v. Bowen**, 55 A.3d 1254, 1264 (Pa. Super. 2012). The trial court did so here, and Appellant fails to articulate any reasons why the trial court abused its discretion in fashioning his sentence.

Next, Appellant argues direct appeal counsel was ineffective for failing to challenge the sufficiency of the evidence pertaining to the aggravated assault conviction. Specifically, Appellant argues direct appeal counsel should have challenged the aggravated assault conviction because there was insufficient evidence regarding the *mens rea* to commit that crime. While not explicitly or impliedly stated anywhere, it appears Appellant is arguing the following: given the jury found Appellant did not intend to inflict

“serious bodily injury”³ to the victim in the context of the attempted murder charge, it follows Appellant did not intend to commit aggravated assault on the same victim. As the trial court noted, Appellant “essentially argues that this verdict is inconsistent,” Trial Court Opinion, 7/1/13, at 8, and that direct appeal counsel was ineffective for not having raised this issue. Appellant fails to recognize inconsistent verdicts are permissible under Pennsylvania law, and had direct appeal counsel made such a challenge it would have been deemed meritless. In **Commonwealth v. Frisbie**, 889 A.2d 1271 (Pa. Super. 2005), this Court noted:

“Inconsistent verdicts, while often perplexing, are not considered mistakes and do not constitute a basis for reversal.” **Commonwealth v. Petteway**, 847 A.2d 713, 718 (Pa. Super. 2004) (citations omitted). Rather, “the rationale for allowing inconsistent verdicts is that it is the jury’s sole prerogative to decide on which counts to convict in order to provide a defendant with sufficient punishment.” **Commonwealth v. Miller**, [] 657 A.2d 946, 948 ([Pa. Super] 1995) (citations omitted). “When an acquittal on one count in an indictment is inconsistent with a conviction on a second count, the court looks

³ As noted by the Commonwealth, with regard to the attempted murder charge, the jury was asked to decide, in addition to whether Appellant was guilty of the charge itself, whether serious bodily injury was inflicted. The question regarding serious bodily injury was included on the verdict sheet in connection with the attempted murder charge to determine whether Appellant might be sentenced to a longer term of imprisonment pursuant to 18 Pa.C.S.A. § 1102(c) (“[A] person who has been convicted of attempt . . . murder , . . .where serious bodily injury results may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years”), had Appellant been found guilty of attempted murder. **See** N.T. Trial, 12/12/07, at 4-5.

upon the acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity. Thus, this Court will not disturb guilty verdicts on the basis of apparent inconsistencies as long as there is sufficient evidence to support the verdict."

Petteway, *supra*.

Id., 889 A.2d at 1273. Because the claim is meritless, direct appeal counsel was not ineffective for failing to raise this claim. **See Commonwealth v. Sepulveda**, 55 A.3d 1108, 1118 (Pa. 2012) ("Counsel cannot be deemed ineffective for failing to raise a meritless claim") (citation omitted).⁴

⁴ The claim is also meritless because the evidence was sufficient to find Appellant guilty of aggravated assault. "A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa.C.S.A. § 2702(a)(1). **See** N.T. Trial, 12/17/07, at 142-43. As the trial court recounted, according to one witness, victim "was then struck in the head with [a baseball] bat by [Appellant]." Trial Court Opinion, 7/1/13, at 2 (citation to record omitted). Another witness, "saw what proved to be [victim] on the ground and [Appellant] swinging the bat at her unconscious body." **Id.** "[Victim] had a fractured skull. . . . She had either nine or ten staples in her head and had to remain at home for a full three weeks, basically not able to move." **Id.** During this time, victim endured constant headaches. When she returned to work, the headaches began again. At the time of trial, victim still suffered from headaches.

Appellant does not argue victim did not suffer serious bodily injury; he questions whether there was sufficient evidence to show he acted with the required *mens rea*. When, such as in the instant case,

the victim suffers serious bodily injury, the Commonwealth need not prove specific intent. The Commonwealth need only prove appellant acted recklessly under circumstances manifesting an extreme indifference to the value of human life. For the degree of recklessness contained in the aggravated assault statute to occur, the offensive act must be performed under circumstances which almost assure that injury or death will ensue. Swinging a

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Next, Appellant argues trial counsel was ineffective for recommending that he proceed to trial. The entire argument is summarized in the following phrase: “[Trial] counsel gave no reason expect [sic] the statement that counsel though [sic] he could win without any explanation.” Appellant’s Brief at 11; **see also id.** at 6 (citing in support certification submitted to trial court at D-1 to D-4).

Based on what transpired at a hearing held on August 24, 2007,⁵ the trial court concluded trial counsel was not unreasonable in advising to go to trial, “particularly in light of the mandatory minimum that this [c]ourt was required to dispense.” Trial Court Opinion, 7/1/13, at 13 (citing N.T., 8/24/07, at 4-6). The trial court also noted: “On the record, trial counsel indicated that he had spent considerable time with [Appellant] informing him

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bat into a person’s head is just such a life-threatening circumstance.

Commonwealth v. Nichols, 692 A.2d 181, 185 (Pa. Super. 1997) (quotation marks, citations, and brackets omitted).

As in **Nichols**, we also conclude:

As the evidence was sufficient to prove at the very least the degree of recklessness required under 18 Pa.C.S. § 2702, trial counsel was not ineffective for failing on appeal to challenge the sufficiency of the evidence.

Id.

⁵ The hearing was held following Appellant’s filing of petitions for bail reduction and for recusal of the trial court. In the meantime, on August 22, 2007, the trial court granted Appellant’s motion to withdraw his guilty plea.

of the consequences of this particular case, its degree of severity, and, regardless of counsel's opinion, the fact that [Appellant] had the right to withdraw his plea." ***Id.***

Appellant was fully aware of the consequences of the plea and its withdrawal. It appears, therefore, disingenuous to blame trial counsel for the unfavorable consequences of his own decision. Additionally, while Appellant avers trial counsel advised him to proceed to trial because he "could" win it, without any further explanation, a review of the certifications Appellant submitted in support of his petition reveals another story. Apparently, by Appellant's own account, trial counsel repeatedly advised him he "could" win the case, and trial counsel became "even more adamant he could win" after he talked to the witness identified by Appellant following a meeting Appellant had with trial counsel. Letter from Appellant to John P. Cotter, Esq., August 5, 2012, at 2. Thus, there was a witness identified by Appellant who gave trial counsel reason to believe he could win the case. Accordingly, on this record, we conclude the trial court did not err in finding trial counsel was reasonable on advising Appellant to proceed to trial.

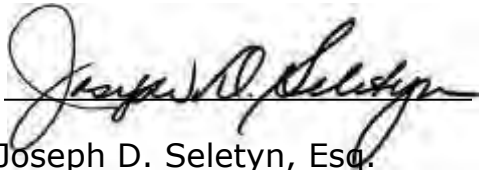
Finally, Appellant argues trial counsel erred in not requesting a self-defense charge even though "[b]oth the prosecutor and the trial judge believed that it was appropriate" under the circumstances. Appellant's Brief at 12. A review of the notes of the testimony of the trial reveals trial counsel, while he had the opportunity to request a self-defense charge, specifically declined it because he thought the "defense of others" charge

was more appropriate under the circumstances. Specifically, trial counsel thought at the time of the incident Appellant believed "his girlfriend was in danger of serious bodily injury." N.T. Trial, 12/17/07, at 50.⁶ Clearly, the course of action had some reasonable basis to effectuate Appellant's interest, even if not successful. Accordingly, the trial court did not err in finding trial counsel effective despite the fact he declined to request a self-defense charge. **See Commonwealth v. Washington**, 927 A.2d 586, 600 (Pa. 2007) ("A claim of ineffectiveness generally cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued.").

In light of the foregoing, we conclude the trial court properly denied Appellant's PCRA petition. Accordingly, we affirm the trial court order.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/23/2014

⁶ As trial counsel put it, "it is not what everybody else thought. It's what [Appellant] thought at the time. And [he] believe[d] [he] thought [sic] his girlfriend was in danger of bodily injury, I think that's the appropriate charge. It's what's in his mind." **Id.**