NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JALIK PEAY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2030 EDA 2017

Appeal from the PCRA Order Entered June 12, 2017
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0011915-2010

BEFORE: BENDER, P.J.E., LAZARUS, J., and KUNSELMAN, J.

MEMORANDUM BY BENDER, P.J.E.: **FILED JUNE 18, 2018**

Appellant, Jalik Peay, appeals *pro se* from the post-conviction court's June 12, 2017 order denying his first petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. After careful review, we affirm.

The PCRA court summarized the facts of Appellant's case in its Pa.R.A.P. 1925(a) opinion, and we need not restate them in detail herein. ***See*** PCRA Court Opinion (PCO), 9/22/17, at 1-2. We only note that Appellant was convicted of attempted murder and related offenses in June of 2012. This Court affirmed his judgment of sentence on October 22, 2015, and in March of 2016, our Supreme Court denied his petition for allowance of appeal. ***See Commonwealth v. Peay***, 134 A.3d 104 (Pa. Super. 2015) (unpublished memorandum), *appeal denied*, 135 A.3d 585 (Pa. 2016).

On July 14, 2016, Appellant filed a timely, *pro se* PCRA petition. Gina A. Capuano, Esq., was appointed to represent Appellant. However, rather than filing an amended petition on Appellant's behalf, Attorney Capuano filed a ***Turner/Finley***[1] 'no merit letter' and a petition to withdraw. On April 10, 2017, the PCRA court issued a Pa.R.Crim.P. 907 notice of its intent to dismiss Appellant's petition. Appellant did not respond to the court's Rule 907 notice or Attorney Capuano's petition to withdraw; accordingly, on June 9, 2017, the PCRA court granted counsel leave to withdraw.[2] On June 12, 2017, the court issued an order dismissing Appellant's petition.

On June 16, 2017, Appellant filed a timely, *pro se* notice of appeal. On June 28, 2017, the PCRA court issued an order directing him to file a Pa.R.A.P. 1925(b) statement. According to the PCRA court, it received a *pro se* Rule 1925(b) statement from Appellant on July 18, 2017, but Appellant never actually filed that document. ***See*** PCRA Court Opinion (PCO), 9/22/17, at 4.

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[1] ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

[2] We note that Attorney Capuano's petition was orally granted by the PCRA court at a brief hearing that occurred on June 9, 2017. However, the docket does not include an entry showing that proceeding took place, and the certified record transmitted to this Court did not initially include any transcripts from that brief hearing. Moreover, because the PCRA court did not file a written order granting counsel's petition, the trial court's docket also did not evince that any decision had been made on counsel's request to withdraw. Only recently were the transcripts of the June 9, 2017 hearing added to the certified record, and the docket retroactively corrected to note the PCRA court's granting of counsel's petition. We suggest that in the future, the PCRA court file a written order to accompany any oral grant of a petition to withdraw, so as to make the record clear for appellate review.

Nevertheless, on September 22, 2017, the court issued a Rule 1925(a) opinion addressing the following three, *pro se* issues raised in Appellant's concise statement and reiterated herein:

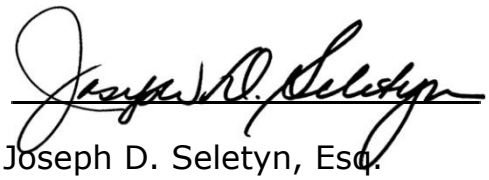
> (a) Was counsel for [Appellant] … ineffective when he failed to object to the judge's improper, and prejudice [*sic*] jury instruction?
>
> (b) Was [Appellant] not intittled [*sic*] to a fair hearing, with all constitutional rights intact[?]
>
> (c) Is it law that all sentences shall be authorized by the sentencing code, with the statutes applied so a defendant can be aware of the legislature's intent on what punishment is required for a crime[?]

Appellant's Brief at 2.

We have reviewed the certified record, the briefs of the parties, and the applicable law. Additionally, we have reviewed the opinion of the Honorable Ann M. Butchart of the Court of Common Pleas of Philadelphia County. We conclude that Judge Butchart's opinion sufficiently addresses the issues presented by Appellant. Accordingly, we adopt her opinion as our own and affirm the order denying Appellant's PCRA petition on the grounds set forth therein.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/18/18

S17013-18

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0011915-2010

v.

Jalik Peay : SUPERIOR COURT
NO. 2030 EDA 2017

OPINION

BUTCHART, J. September 22, 2017

This is an appeal of the Court's June 9, 2017 Order denying Jalik Peay's ("Petitioner") Petition under the Post-Conviction Relief Act ("PCRA").

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

At approximately 9:30 p.m. on March 2, 2010, Shikeem Alexander-Frederick ("Complainant") got into his silver Buick sedan and drove to the neighborhood store to purchase cigarettes. N.T. 6/06/2012 p. 38, 47; N.T. 6/08/2012 p. 85. When he arrived at the corner of Chew and Locust in the Germantown section of Philadelphia, he encountered Petitioner, who was with Ashia Terry ("Terry") and Arron Williams ("Williams"). N.T. 6/06/2012 p. 97. Petitioner, Terry and Williams were known for their affiliation to a gang called the Jungle Mob Soldiers ("JMS"). *Id.*

Complainant got into a verbal argument, which escalated when Petitioner brandished a .357 Smith and Wesson revolver and shot Complainant five times. N.T. 6/08/2012 p. 36; N.T. 6/07/2012 p. 131-32; N.T. 6/08/2012 p. 108; N.T. 6/11/2012 p. 11-12.

Due to Complainant's extensive injuries, doctors at Einstein Medical Center placed him into a medically induced coma for approximately one month. When Complainant regained consciousness, he identified Petitioner as the gunman.

The preliminary hearing was scheduled for June 17, 2010. Complainant, who was released from the hospital at the end of May 2010, met with Assistant District Attorney Bridget McVan a week prior to the hearing. N.T. 6/11/2012 p. 44-45. During these preparations, he reaffirmed that he would testify, under oath, that Petitioner was indeed the man who shot him on March 2, 2010. N.T. 6/11/2012 p. 45.

On June 12, 2010, five days before the preliminary hearing, Complainant was executed on the front porch of his home located in Philadelphia. N.T. 6/11/2012 p. 27-35; C-32. He suffered approximately seven gunshot wounds and died almost instantly. N.T. 6/11/2012 p.27-35; N.T. 6/11/2012 p. 51. No one has been charged with the murder of Complainant.

Petitioner took steps to ensure that Complainant would not testify against him. *See* Superior Court I.O.P. 65.37; 495 EDA 2013. While incarcerated, by way of letters and telephone conversations, Petitioner remained in contact with members of the JMS and his family and made several references to ending Complainant's life. N.T. 6/08/2012 p. 56, 59; N.T 6/11/2012 p. 53-55; C-29; C-30a-b.

On January 9, 2012, the Court[1] heard Petitioner's motion regarding the admissibility of Complainant's statement to Philadelphia Detective Knecht on April 9, 2010. The court held the motion under advisement, and on January 13, 2012, ruled that the statement was admissible at trial as substantive evidence. Defendant filed a motion for reconsideration, which was denied on January 31, 2012.

[1] The Honorable Sandy Byrd of the Philadelphia Court of Common Pleas presided over this motion.

Petitioner was held for court and on June 13, 2012, a jury found Petitioner guilty of the following charges: Attempted Murder, a felony of the first degree[2]; Aggravated Assault, a felony of the first degree[3]; Carrying a Firearm Without a License, a felony of the third degree[4]; Carrying a Firearm in Public in the City of Philadelphia, a misdemeanor of the first degree[5]; and Possessing an Instrument of Crime, a misdemeanor of the first degree[6]. On September 27, 2012, Petitioner was sentenced to eighteen to thirty-six years for attempted murder, a one and one-half year sentence for carrying an unlicensed firearm, and a one to two year sentence for carrying a firearm in Philadelphia, each to be served consecutively for an aggregate term of twenty and one-half (20 ½) to forty-one years incarceration.

On February 8, 2013, Petitioner filed his first appeal under 495 EDA 2013. On October 22, 2015, Petitioner's judgment of sentence was affirmed under 495 EDA 2013, which included Petitioner's claim that the admission of the victim's hearsay statement to Philadelphia Detectives on April 9, 2010, was in error because the statement did not qualify for admission under any recognized hearsay exception, and therefore, the Complainant's Constitutional right to confront his accuser was denied. *See* 495 EDA 2013; *also see* Superior Court I.O.P. 65.37.

On July 14, 2016, Petitioner filed a PCRA petition. On April 2, 2017, Petitioner's PCRA Counsel, Gina Capuano, Esquire, filed a *Finley* letter. which stated Petitioner's claims lacked arguable merit. See *Finley* letter dated April 3, 2017. On April 10, 2017, the PCRA Court ordered a Rule 907 Notice to be sent to Petitioner informing him of the Court's intent to dismiss his petition. On June 9, 2017, the PCRA Court dismissed Petitioner's PCRA petition. On June

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[2] 18 Pa C.S A § 901(a)
[3] 18 Pa C.S.A § 2702(a)
[4] 18 Pa C S.A § 6106(a)(1).
[5] 18 Pa.C.S A. § 6108
[6] 18 Pa.C.S A § 907

16, 2017, Petitioner filed this appeal. On July 18, 2017, this Court received a Statement of Errors Complained of on Appeal ("Statement") in which Petitioner argues:

> 1. Trial counsel was ineffective because he allowed the trial court to give [an] improper jury instruction, which allowed the Commonwealth to be relieved [*sic*] of proving all elements of the crime beyond a reasonable doubt.
>
> 2. The sentencing judge violated Petitioner's 5th and 14th Amendment rights when she imposed the sentence without ever disclosing Petitioner's sentencing statute on the record or any document.
>
> 3. Petitioner's 6th Amendment right to confrontation was taken away unlawfully and unconstitutionally because the Court used inadmissible evidence to do so.

See Statement at ¶¶ 1-3. Petitioner did not filed his Statement. For the reasons set forth below, the PCRA Court's dismissal of Defendant's PCRA Petition should be affirmed.

II. DISCUSSION

1. Trial counsel was not ineffective for allowing the trial court to give an improper jury instruction, which Petitioner argues relieved the Commonwealth of its burden to prove all elements of the crime beyond a reasonable doubt.

Petitioner first argues that trial counsel was ineffective for failing to object to an improper jury charge for attempted murder. This claim is meritless. The jury instruction for attempted murder was proper and trial counsel was not ineffective for failing to object.

A claim of error is waived if the Petitioner could have raised the issue at trial, on appeal, or in a prior PCRA Petition but failed to do so. *Commonwealth v Peterkin*, 572 A.2d 2 (Pa. 1994); *see also* 42 Pa.C.S.A. § 9544(b). However, ineffectiveness claims overcome waiver. *Commonwealth v Perlman*, 572 A.2d 2 (Pa. Super Ct. 1990).

To warrant relief based on a claim of ineffective assistance of counsel, a defendant must show that such ineffectiveness "in the circumstances of the particular case, so undermine the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Commonwealth v Jones*, 912 A.2d 268, 278 (Pa. 2006), see also 42 Pa.C.S. §

9543(a)(2)(ii). Counsel is presumed to be effective. *Commonwealth v. Bennett*, 57 A.3d 1185, 1195 (Pa. 2012); *Jones*, 912 A.2d at 278. To overcome the presumption, the petitioner has to satisfy the performance and prejudice test set forth in *Strickland v Washington*, 466 U.S. 668 (1984). The Supreme Court of Pennsylvania has applied the *Strickland* test by looking at three elements, whether: (1) the underlying claim has arguable merit; (2) any reasonable basis existed for counsel's actions or failure to act; and (3) the petitioner has shown that he suffered prejudice as a result of counsel's lapse, *i.e* , that there is a reasonable probability that the result of the proceeding would have been different. *Bennett*, 57 A.3d at 1195-96 (*citing Commonwealth v Pierce*, 527 A.2d 973, 975 (Pa. 87)). If a claim fails under any necessary element of the *Strickland* test, the court may proceed to that element first. *Bennett,* 57 A.3d at 1195-96

The standard of review of an order dismissing a PCRA petition is in the light most favorable to the prevailing party at the PCRA level. *Commonwealth v. Rykard*, 55 A.3d 177, 183 Super. Ct. 2012) (citing *Commonwealth v Ford,* 44 A.3d 1190, 1194 (Pa. Super. Ct. 2012); *Commonwealth v Burkett,* 5 A.3d 1260, 1267 (Pa. Super. Ct. 2010). The review is limited to the findings of the PCRA court and the evidence of record. *Id.* The Appellate Court will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error. *Id.* The PCRA Court's decision may be affirmed on any ground if the record supports it. *Id.* Great deference is given to the PCRA Court's factual findings and those findings will not be disturbed unless they have no support in the record. *Id.*; *Commonwealth v. Carter,* 21 A.3d 680, 682 (Pa. Super. Ct. 2011). "However, we afford no such deference to [the PCRA Court's] legal conclusions." *Id.*; *Commonwealth v Paddy,* 15 A.3d 431, 442 (Pa. 2011). Where the petitioner raises questions of law, the standard of review is *de novo* and the scope of review is plenary. *Id.*; *Commonwealth v. Colavita,* 993 A.2d 874. 886 (Pa. 2010).

Petitioner argues that trial counsel was ineffective for not objecting to an improper jury instruction on accomplice liability. The Court stated the following while charging the jury:

> The specific crime here is attempt. Remember, attempt.
>
> A person has the specific intent to kill if he or she has a fully formed intent to kill and is conscious of his or her own intention. Killing by a person who has the specific intent to kill is a killing with malice. Provided that is also without circumstances that would have provided justification or excuse.
>
> You may ask what conduct is sufficient to constitute an attempt to commit that crime. In...order to find [Petitioner] guilty of attempted murder of the first degree you must be satisfied that the following three elements beyond a reasonable doubt:
>
> First, that the [Petitioner] did a certain act.
>
> Second, that the [Petitioner] or a coconspirator or accomplice did the act with intent to commit the crime of murder in the first degree.
>
> And third, that the act constituted a substantial step towards the commission of that crime.
>
> Let me address the issue of intent. A person cannot be guilty of an attempt to commit a crime unless he has a firm intent to commit that crime. If he has not definitely made up his mind, if his purpose is uncertain or wavering then he lacks the kind of intent that is required for the attempt.
>
> Let's discuss the issue of a substantial step. A person cannot be guilty of an attempt to commit a crime unless he does an act that constitutes a substantial step toward the commission of a crime. An act is a substantial step if it is a major step toward commission of the crime and strongly corroborates your belief that the [Petitioner] at the time he did the act had a firm intent to commit the crime. An act can be a substantial step even though other steps would have to be taken before the crime itself can be carried out. If you are satisfied that the three elements of attempted murder of the first degree has been proven beyond a reasonable doubt you should find the [Petitioner] guilty. Otherwise, you should find the [Petitioner] not guilty of this crime.

N.T., 6/12/2012 pp. 71-73

A trial court has wide discretion in phrasing jury instructions. When reviewing an allegation of an incorrect jury instruction, the appellate court must view the entire charge to determine whether the trial court clearly and accurately presented the concepts of the legal issue

to the jury and should not reverse, as a result of the instruction, unless the trial court committed an abuse of its discretion. The appellate court will not examine a phrase or sentence of an instruction in a vacuum and will evaluate a challenge to a charge based on how each part fits together to convey a complete legal principle. *Commonwealth v Geathers*, 847 A.2d 730, 733-34 (Pa. Super Ct. 2004); *Commonwealth v Ragan*, 743 A.2d 390, 397-398 (Pa. 1999). Additionally, "trial counsel will not be held ineffective for failure to object to an erroneous jury instruction unless the petitioner can establish prejudice: *i e* , if counsel had objected to the charge, there is a reasonable probability that the result at trial would have been different." *Geathers*, 847 A.2d at 734; *Commonwealth v McGill* 832 A.2d 1014, 1023 (Pa. 2003).

In order "[f]or a defendant to be found guilty of attempted murder, the Commonwealth must establish specific intent to kill." *Geathers*, 847 A.2d at 734; *Commonwealth v Anderson*, 650 A.2d 20. 24 (Pa. 1994).

Here, the Court properly instructed the jury on the charge of attempted murder. The instruction included the element of specific intent. The Court did not instruct on conspiracy or accomplice liability because Petitioner was not charged with conspiracy and the Commonwealth did not prosecute under a theory of accomplice liability. Despite Petitioner's argument that the Commonwealth presented their case "as if [P]etitioner had one or more accomplices", the testimony at trial showed that Complainant identified Petitioner as the sole shooter. N.T., 6/6/12 pp. 55-56. The jury found Petitioner guilty of the charge of attempted murder based on evidence that it was Petitioner who fired five shots at Complainant. Counsel was not ineffective in failing to object to the jury instruction as read.

2. The sentencing judge did not violate Petitioner's 5th and 14th Amendment rights when she imposed the sentence without disclosing Petitioner's sentencing statute on the record or any document.

Petitioner argues that the sentencing judge violated Petitioner's rights at sentencing. In his 1925(b) Statement, Petitioner broadly contends that "the sentencing judge violated Petitioner's 5th and 14th Amendment rights when she imposed the sentence without ever disclosing Petitioner's sentencing statute on the record or any document." See Statement at ¶ 2. In his *pro se* Petition, Petitioner initially claimed that he was sentenced to a mandatory minimum sentence under Pa.C.S. § 9712 (Sentences Committed with Firearms) in violation of *Alleyne v. United States*, 133 S.Ct. 2151 (2013), and that the failure of the Court to disclose the sentencing statute violated Petitioner's rights. This claim is without merit. Petitioner was not sentenced under a sentencing statute and Petitioner was not given a mandatory minimum sentence.

It is well settled that "[s]entencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of that discretion." *Commonwealth v Glass*, 50 A.3d 720, 727 (Pa. Super. Ct 2012). When challenging a sentence, an appellant must reference the record to establish "that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." *Id.*

If a "minimum sentence is statutorily mandated, a sentencing court lacks the authority to impose a sentence less severe than dictated by the legislature." *Commonwealth v. Carroll*, 651 A.2d 171, 172–73 (Pa. Super. Ct. 1994); Commonwealth v. Green, 593 A.2d 899, 900 (Pa. Super. Ct. 1991). However, "before imposing a mandatory minimum sentence, a sentencing court must determine whether the offense for which the defendant was convicted falls within the parameters of the sentencing scheme." *Carroll*, 651 A.2d at 173.

Here, Petitioner was sentenced to eighteen to thirty-six years for Attempted Murder, a one and one-half year sentence for Carrying an Unlicensed Firearm, and a one to two year sentence for Carrying a Firearm in Philadelphia. The charge of Aggravated Assault merged with Attempted Murder and there was no further penalty imposed for Possessing an Instrument of Crime. Petitioner was not sentenced under a sentencing statute. Further, at sentencing, there was no discussion of a mandatory minimum sentence *See* N.T., 9/27/12. If imposed, the mandatory minimum sentence under 42 Pa.C.S. § 9712 would have been five years. The only charge the mandatory minimum could have applied to under § 9712 was Attempted Murder for which Petitioner was sentenced to eighteen to thirty-six years.

Because Petitioner was not given a mandatory minimum sentence, *Alleyne* does not apply. The sentencing judge did not violate Petitioner's rights. There was no failure to disclose because Petitioner was not sentenced under a sentencing statute.

3. Petitioner's 6th Amendment right to confrontation was not taken away unlawfully and unconstitutionally because the Court did not allow inadmissible evidence.

Finally, Petitioner argues that the Commonwealth introduced inadmissible evidence at trial.

Petitioner's inadmissible evidence issue has been previously addressed by the Superior Court of Pennsylvania under 495 EDA 2013, which included the signed, adopted statement Complainant made to Philadelphia Detectives, which was properly admitted under Pa.R.E. 804(b)(6).

When the Superior Court has thoroughly discussed the claims of the Petitioner in an Opinion affirming the judgment of sentence, "the issues have been finally litigated and are not subject to further review in a post-conviction proceeding." *Commonwealth v Bond*, 630 A.2d 1281 (Pa. Super. Ct. 1993).

Here, the Superior Court in its Opinion stated "the Commonwealth presented ample evidence that [Petitioner] was involved in procuring [Complainant's] unavailability, thus precluding him from testifying at [Petitioner's] trial." *See* Superior Court I.O.P. 65.37 at 10. Petitioner's issue was fully addressed under 495 EDA 2013, because the Superior Court found that Petitioner's actions made Complainant's out of court statements admissible under Pa.R.E. 804(b)(6), *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. Id.* at 9. Petitioner's claim that his right to confrontation was abrogated was conclusively analyzed and denied at 495 EDA 2013.

III. CONCLUSION

For all of the above reasons, the PCRA Court's dismissal of Defendant's PCRA Petition should be affirmed.

BY THE COURT:

BUTCHART, J.