NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JELANI A. BARRO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1405 MDA 2013

Appeal from the PCRA Order July 11, 2013
In the Court of Common Pleas of Adams County
Criminal Division at No(s): CP-01-CR-0000427-2012

BEFORE: GANTMAN, P.J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY GANTMAN, P.J.: **FILED APRIL 14, 2014**

Appellant, Jelani A. Barro, appeals from the order entered in the Adams County Court of Common Pleas, dismissing his first petition pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

The relevant facts and procedural history of this appeal are as follows.

> On December 8, 2011, Trooper William Mitchell and Trooper James David of the Pennsylvania State Police were on patrol on State Route 97 in Adams County, Pennsylvania. The troopers testified that, at approximately 1:52 a.m., they observed Appellant's vehicle traveling at a high rate of speed and "pulling away" from them. After determining that the vehicle was speeding, Trooper Mitchell activated his lights and sirens and conducted a traffic stop of Appellant's vehicle. Upon interacting with Appellant, Trooper Mitchell testified that he noticed that Appellant's eyes were glassy and bloodshot

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[1] 42 Pa.C.S.A. §§ 9541-9546.

and that he smelled strongly of alcohol. Trooper Mitchell then asked Appellant to exit his vehicle and perform field sobriety tests. Based on their observations of Appellant and his performance on the field sobriety tests, the troopers determined that Appellant was under the influence of alcohol to the extent that he was incapable of safe driving. Trooper Mitchell placed Appellant under arrest and transported him to Gettysburg Hospital for blood alcohol content ("BAC") testing. The test results revealed that Appellant's BAC was .107 percent. Appellant was thereafter charged with Driving Under the Influence of Alcohol ("DUI") [and related offenses].

At the conclusion of his December 6, 2012 jury trial, Appellant was convicted of DUI, General Impairment, DUI, High Rate of Alcohol, and Careless Driving. The Commonwealth withdrew its charge of exceeding Maximum Speed Limits because, at the time of trial, it was unable to produce the certificate of calibration for the speedometer in the State Police cruiser. The DUI was a third conviction and on February 14, 2013, Appellant was sentenced to one to five years in a State Correctional Institution.

Initially, Appellant filed a direct appeal from his convictions on March 5, 2013. On April 18, 2013, Appellant filed a Concise Statement of Matters Complained of on Appeal in which he indicated that "any existing issues are best raised in a filing under the [PCRA]." Appellant subsequently filed a *Praecipe* to Withdraw Appeal, which the Pennsylvania Superior Court granted on April 23, 2013.

On May 24, 2013, Appellant filed a counseled [PCRA petition] along with a Petition for Bail Pending PCRA Litigation. [The PCRA court] denied Appellant's Petition for Bail upon a finding that Appellant's case did not present compelling reasons to justify the granting of bail.

Appellant's [PCRA petition] alleges that his trial counsel…were ineffective based on their failure to file an omnibus pretrial motion challenging the allegedly unlawful stop of Appellant's vehicle and failure to object at trial and argue that the vehicle stop was unlawful. On June 20, 2013, [the PCRA court] notified Appellant of its intent to dismiss his [PCRA petition], advised Appellant of the

> reasons for the proposed dismissal, and afforded Appellant twenty days to respond. Appellant replied with a brief in support of his PCRA petition, filed on July 5, 2013. After reviewing Appellant's response, [the PCRA court] determined that Appellant raised no new issues which warranted review or additional legal authority not addressed in the [PCRA court's] June 20, 2013 letter. Appellant's [PCRA petition] was dismissed by Order dated July 11, 2013.

(PCRA Court Opinion, filed September 13, 2013, at 1-3).

Despite having counsel of record, Appellant timely filed a *pro se* notice of appeal on July 29, 2013. On August 9, 2013, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a *pro se* Rule 1925(b) statement on August 28, 2013.[2] Upon consideration of Appellant's *pro se* docketing statement, this Court recognized that PCRA counsel had yet to withdraw from the case. On September 12, 2013, this Court ordered counsel to enter her appearance in this Court within fourteen (14) days and continue her representation of Appellant.

On September 26, 2013, counsel entered her appearance in this Court. That same day, counsel filed a motion to withdraw representation. On October 4, 2013, this Court denied the motion, observing that counsel had failed to comply with the withdrawal requirements set forth in ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988) and

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[2] The record does not indicate that the clerk of courts forwarded copies of the *pro se* filings to counsel, pursuant to Pa.R.Crim.P. 576(A)(4).

Commonwealth v. Finley, 550 A.2d 213 (1988) (*en banc*). Counsel subsequently filed an advocate's brief on Appellant's behalf.

Appellant now raises one issue for our review:

> A PCRA CLAIM MAY BE DENIED A HEARING WHERE THE CLAIMS SET FORTH ARE PATENTLY FRIVOLOUS AND THE ISSUES HAVE NO TRACE OF SUPPORT EITHER IN THE RECORD OR FROM OTHER EVIDENCE. HERE, THERE IS EVIDENCE, AND THEREFORE ARGUABLE MERIT TO [APPELLANT'S] CLAIMS, THAT [APPELLANT'S] TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO CHALLENGE THE LEGALITY OF THE STOP. DID THE [PCRA] COURT IMPROPERLY DENY [APPELLANT'S] PCRA PETITION WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING?

(Appellant's Brief at 4).[3]

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[3] As a preliminary matter, the PCRA court recognized that both the counseled PCRA petition and *pro se* Rule 1925(b) statement presented issues concerning the vehicle stop. The court contended that the counseled PCRA petition raised the issues under the rubric of trial counsels' ineffectiveness, but the *pro se* Rule 1925(b) statement did not. Consequently, the PCRA court determined that Appellant had waived the issues raised in the *pro se* Rule 1925(b) statement. (***See*** PCRA Court Opinion at 6-7.)

Despite the PCRA court's findings, we emphasize that counsel of record effectively abandoned Appellant from the time the court denied PCRA relief until the entry of the order directing counsel to enter her appearance in this Court. Complicating matters, the PCRA court did not forward Appellant's *pro se* filings to counsel. ***See*** Pa.R.Crim.P. 576(A)(4). The court also failed to conduct a hearing to evaluate whether Appellant desired to proceed *pro se*, or whether Appellant was entitled to new appointed counsel. ***See Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998) (holding when waiver of right to counsel is sought at post-conviction or appellate stage, court must determine on record that waiver is knowing, intelligent and voluntary); ***Commonwealth v. White***, 871 A.2d 1291 (Pa.Super. 2005) (stating indigent petitioner is entitled to representation by counsel for first PCRA petition; right to representation exists throughout post-conviction

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Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). This Court grants great deference to the findings of the PCRA court if the record contains any support for those findings. ***Commonwealth v. Boyd***, 923 A.2d 513 (Pa.Super. 2007), *appeal denied*, 593 Pa. 754, 932 A.2d 74 (2007). We give no such deference, however, to the court's legal conclusions. ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa.Super. 2012). Further, a petitioner is not entitled to a PCRA hearing as a matter of right; the PCRA court can decline to hold a hearing if there is no genuine issue concerning any material fact, the petitioner is not entitled to PCRA relief, and no purpose would be served by any further proceedings. ***Commonwealth v. Wah***, 42 A.3d 335, 338 (Pa.Super. 2012).

On appeal, Appellant asserts the troopers conducted the vehicle stop due to a purported speeding violation. Appellant contends that speeding is a

(Footnote Continued) ———————————

proceedings, including any appeal from disposition of PCRA petition). Arguably, this Court could remand the matter for the filing of an amended Rule 1925(b) statement. Nevertheless, the counseled appellate brief addresses the arguments preserved in the PCRA petition. Moreover, the PCRA court analyzed the claims raised on appeal. (***See*** PCRA Court Opinion at 7-10.) Under these circumstances, and in the interest of judicial economy, we do not adopt the PCRA court's waiver analysis.

"non-investigatory" offense; therefore, the troopers needed to possess probable cause to support the stop. Appellant argues the troopers did not testify that they observed erratic driving, swerving, or the inability to remain in one lane. Appellant further argues the troopers' bald assertions that the vehicle traveled at a "high" or "excessive" rate of speed were the only evidence of a Motor Vehicle Code violation prior to the stop. Under these circumstances, Appellant insists the troopers did not possess probable cause. Appellant concludes there is arguable merit to his claim that trial counsel were ineffective for failing to challenge the legality of the stop, and this Court must remand the matter for an evidentiary hearing.[4] We disagree.

The law presumes counsel has rendered effective assistance. ***Commonwealth v. Williams***, 597 Pa. 109, 950 A.2d 294 (2008). When asserting a claim of ineffective assistance of counsel, the petitioner is required to demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel had no reasonable strategic basis for his action or inaction; and, (3) 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. Kimball***, 555 Pa. 299, 724 A.2d 326 (1999). The

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[4] Throughout his brief, Appellant cites to cases involving vehicle stops based on violations of 75 Pa.C.S.A. § 3361, driving vehicle at safe speed. These cases are distinguishable, because the troopers did not stop Appellant for a Section 3361 violation.

failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Williams, supra***.

"The threshold inquiry in ineffectiveness claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit…." ***Commonwealth v. Pierce***, 537 Pa. 514, 524, 645 A.2d 189, 194 (1994). "Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004).

> Once this threshold is met we apply the 'reasonable basis' test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective.

Pierce, supra at 524, 645 A.2d at 194-95 (internal citations omitted).

> Prejudice is established when [a defendant] demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In [***Kimball, supra***], we held that a "criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Commonwealth v. Chambers, 570 Pa. 3, 21-22, 807 A.2d 872, 883 (2002) (some internal citations and quotation marks omitted).

Additionally, Section 6308 of the Motor Vehicle Code provides:

> **§ 6308. Investigation by police officers**

* * *

> **(b) Authority of police officer.—**Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has **reasonable suspicion** that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

75 Pa.C.S.A. § 6308(b) (emphasis added).

"Traffic stops based on a reasonable suspicion[,] either of criminal activity or a violation of the Motor Vehicle Code under the authority of Section 6308(b) must serve a stated investigatory purpose." ***Commonwealth v. Feczko***, 10 A.3d 1285, 1291 (Pa.Super. 2010), *appeal denied*, 611 Pa. 650, 25 A.3d 327 (2011).

> In effect, the language of Section 6308(b)—to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title—is conceptually equivalent with the underlying purpose of a ***Terry***[5] stop.
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> Mere reasonable suspicion will not justify a vehicle stop when the driver's detention cannot serve an investigatory purpose relevant to the suspected violation. In such an instance, it is [incumbent] upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, **which would provide probable cause to believe that the vehicle or the driver was in violation of some provision of the Code**.

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[5] ***Terry v. Ohio***, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Id. (emphasis in original) (internal citations and quotation marks omitted).

"Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a [person] of reasonable caution in the belief that the suspect has committed or is committing a crime." ***Commonwealth v. Thompson***, 604 Pa. 198, 203, 985 A.2d 928, 931 (2009) (internal quotation marks omitted).

> The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we require **only a probability**, and not a *prima facie* showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

Id. (emphasis in original) (internal citations and quotation marks omitted). Pennsylvania law makes clear, however, that a police officer has probable cause to stop a motor vehicle if the officer observed a traffic code violation, even if it is a minor offense. ***Commonwealth v. Chase***, 599 Pa. 80, 89, 960 A.2d 108, 113 (2008).

The Motor Vehicle Code defines the offense of maximum speed limits as follows:

> **§ 3362. Maximum speed limits**
>
> **(a) General rule.—**Except when a special hazard exists that requires lower speed for compliance with section 3361 (relating to driving vehicle at safe speed), the limits specified in this section or established under this subchapter shall be maximum lawful speeds and no person shall drive a vehicle at a speed in excess of the following maximum limits:

* * *

(3) Any other maximum speed limit established under this subchapter.

75 Pa.C.S.A. § 3362(a)(3).

"The rate of speed of any vehicle may be timed on any highway by a police officer using a motor vehicle equipped with a speedometer." 75 Pa.C.S.A. § 3368(a). "In ascertaining the speed of a vehicle by the use of a speedometer, the speed shall be timed for a distance of not less than three-tenths of a mile." ***Id.*** "[T]o sustain a speeding conviction under [Section] 3362, the Commonwealth must present evidence which would satisfy the requirements of [Section] 3368." ***Commonwealth v. Martorano***, 563 A.2d 1229, 1232 (Pa.Super. 1989), *appeal denied*, 525 Pa. 597, 575 A.2d 563 (1990). Although a trooper's opinion testimony alone is insufficient to **convict** a defendant of speeding, it can support a vehicle stop for a suspected violation of Section 3362. ***Commonwealth v. McElroy***, 630 A.2d 35 (Pa.Super. 1993), *appeal denied*, 543 Pa. 729, 673 A.2d 335 (1996).

Instantly, Troopers Mitchell and David were on routine patrol in a marked vehicle when they observed Appellant driving at a high rate of speed. Trooper Mitchell clocked Appellant for three-tenths of a mile using the speedometer in the patrol vehicle. (***See*** Affidavit of Probable Cause, dated 1/6/12, at 1). The speedometer revealed that Appellant was traveling

eighty (80) miles per hour through an area with a posted limit of forty-five (45) miles per hour. (***Id.***) Based upon the information obtained from the speedometer, the troopers initiated a vehicle stop. During the stop, the troopers observed *indicia* of intoxication. After Appellant failed field sobriety tests, the troopers arrested him for DUI.

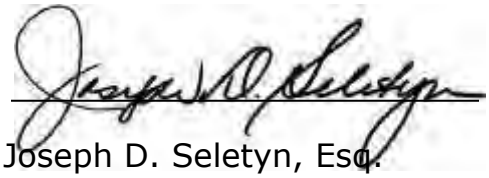
Prior to trial, the Commonwealth filed a criminal information that included one count of maximum speed limits. At trial, Troopers Mitchell and David confirmed that they followed Appellant's vehicle, determined it was speeding, and conducted the stop on that basis. Nevertheless, the Commonwealth could not obtain a certificate of accuracy for the speedometer, and it withdrew the speeding charge. (***See*** N.T. Trial, 12/6/12, at 69.) ***See also*** 75 Pa.C.S.A. § 3368(b) (stating speedometers shall have been tested for accuracy within one year prior to alleged violation; certificate from station showing test was made, date of test, and degree of accuracy of speedometer shall be competent and *prima facie* evidence of those facts).

Despite the fact that the Commonwealth could not convict Appellant of speeding without the certificate for the speedometer, the troopers' observations established probable cause to believe Appellant had exceeded the posted speed limit. ***See*** 75 Pa.C.S.A. § 3362(a)(3). On this basis, the traffic stop was justified. To the extent Appellant complains the Commonwealth did not present evidence demonstrating the speed of

Appellant's vehicle constituted a safety hazard, such evidence was irrelevant for a stop based on Section 3362. Thus, the troopers did not conduct an illegal vehicle stop, and Appellant's issue regarding trial counsels' alleged ineffectiveness must fail. ***See Thompson, supra***; ***Poplawski, supra***. Accordingly, we affirm the order denying PCRA relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2014