

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

KELVIN MONSANTO

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1459 MDA 2013

Appeal from the PCRA Order July 23, 2013
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0001713-2008

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

MEMORANDUM BY GANTMAN, P.J.:

FILED APRIL 14, 2014

Appellant, Kelvin Monsanto, appeals from the order entered in the Lancaster County Court of Common Pleas, which denied his first petition brought pursuant to the Post Conviction Relief Act ("PCRA").¹ We affirm.

In its opinion, the PCRA court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them.

Appellant raises the following issues for our review:

WHETHER THE [PCRA COURT] ERRED IN REFUSING POST-
CONVICTION RELIEF WHERE TRIAL COUNSEL FAILED TO
REQUEST THE IDENTITIES OF CONFIDENTIAL
INFORMANTS CITED IN THE AFFIDAVIT OF PROBABLE

¹ 42 Pa.C.S.A. §§ 9541-9546.

CAUSE SUBMITTED IN THE APPLICATION FOR THE SEARCH WARRANT[.]

WHETHER THE [PCRA COURT] ERRED IN DENYING POST-CONVICTION RELIEF WHERE TRIAL COUNSEL FAILED TO CHALLENGE THE RELIABILITY OF THE CONFIDENTIAL INFORMANTS CITED IN THE AFFIDAVIT OF PROBABLE CAUSE SUBMITTED IN THE APPLICATION FOR THE SEARCH WARRANT.

(Appellant's Brief at 4).

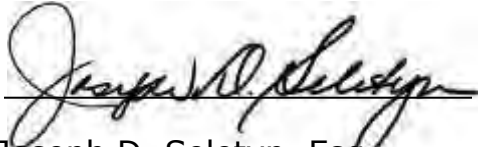
Our standard of review of the denial of a PCRA petition is limited to examining whether the evidence of record supports the court's determination and whether its decision is free of legal error. ***Commonwealth v. Conway***, 14 A.3d 101 (Pa.Super. 2011), *appeal denied*, 612 Pa. 687, 29 A.3d 795 (2011). 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). Traditionally, credibility issues are resolved by the trier of fact who had the opportunity to observe the witnesses' demeanor. ***Commonwealth v. Abu-Jamal***, 553 Pa. 485, 527, 720 A.2d 79, 99 (1998), *cert. denied*, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 38 (1999). Where the record supports the PCRA court's credibility resolutions, they are binding on this Court. ***Id.***

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable James P. Cullen, we conclude Appellant's issues merit no relief. The PCRA court's opinion fully discusses and properly disposes of Appellant's issues on appeal. (**See** PCRA Court Opinion, filed July 23, 2013, at 7-10) (finding: police applied for and were granted warrant to search Vine Street residence twelve hours after confidential informants ("CIs") separately told Detective Macey that Mr. Perez had recently brought large quantity of heroin into residence and was preparing to process it; trial counsel testified at PCRA hearing that he believed affidavit was sufficient to support probable cause for issuing search warrant due to CIs' statements and evidence of two controlled buys; trial counsel reasoned that, even if CIs' statements were untrue concerning arrival of additional heroin and were removed from affidavit, controlled buys were enough to establish probable cause to issue search warrant; trial counsel further testified he chose not to compel Commonwealth to reveal identity of CIs because, in trial counsel's opinion, information included in affidavit was sufficient, and he believed CIs' testimony was irrelevant to trial strategy, where affidavit still contained information of CIs' prior purchases and controlled buys from Mr. Perez, which established probable cause for search of residence; Appellant was unable to produce evidence that Detective Macey willfully misstated any of facts in affidavit; record demonstrates counsel exercised appropriate professional judgment in determining that challenge to search warrant lacked merit; trial counsel

cannot be found ineffective for failing to pursue meritless claim, or because chosen strategy resulted in unfavorable outcome for Appellant; Appellant presented no evidence to support his claims of ineffective assistance of counsel and, therefore, is not entitled to relief). The record supports the PCRA court's decision; therefore, we see no reason to disturb it. Accordingly, we affirm on the basis of the PCRA court's opinion.²

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: 4/14/2014

² In its brief, the Commonwealth argues Appellant could not establish a reasonable expectation of privacy in the residence to challenge the search warrant. Due to our disposition, we need not address the Commonwealth's privacy argument.

In the residence, police found two people bagging heroin, a quantity of heroin, scales, glassine bags, and other drug paraphernalia. Defendant was apprehended in the basement of the house where the heroin was located. After being read his *Miranda* rights, Defendant consented to a search of his car. The search of the vehicle yielded more heroin in a sock under the passenger seat.

Trial counsel filed an omnibus pretrial motion which included a motion to suppress the evidence obtained from the residence and Defendant's car on the grounds that police violated the "knock and announce" rule, and the search of Defendant's car was done without his consent. The Court denied Defendant's motion to suppress, and the case proceeded to trial on September 9, 2009.

Following his conviction and sentencing, Defendant filed his notice of appeal to the Superior Court on May 3, 2010.⁵

The Superior Court affirmed the judgment of sentence on October 24, 2011. *Commonwealth v. Monsanto*, 24 A.3d 466 (table) (Pa. Super. 2011).

Defendant, acting *pro se*, filed a motion for post conviction collateral relief on November 10, 2011. Counsel was appointed to represent him, and an amended motion was filed on April 12, 2012.

A hearing on the motion was held on February 26, 2013. At the conclusion of the hearing, the Court ordered the notes of testimony transcribed and established a briefing schedule. For the reasons set out below, the Court concludes that Defendant has failed to establish that he is entitled to relief. Accordingly, the amended motion will be denied.

⁵Defendant's post sentence motion was denied on April 8, 2010.

Discussion

In order to be eligible for relief under the Post Conviction Relief Act (the "Act"),⁶ a defendant must satisfy the requirements of 42 Pa. C.S. § 9543 which provide in pertinent part:

§ 9543. Eligibility for relief

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(1) That the petitioner has been convicted of a crime under the laws of the Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation, or parole for the crime;

...

(2) That the conviction or sentence resulted from one or more of the following:

...

(ii) Ineffective 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.

...

(4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel.

42 Pa. C.S. § 9543(a).

The defendant bears the burden of establishing by a preponderance of the evidence that his conviction resulted from one or more of the enumerated errors listed in the Act.

⁶42 Pa. C.S. §§ 9541-9546.

Commonwealth v. Spotz, 47 A.3d 63, 75-76 (Pa. 2012); *Commonwealth v. Crawley*, 541 Pa. 408, 412, 663 A.2d 676, 678 (1995).

Since Defendant's post conviction motion involves a claim of ineffective assistance of counsel, the following standards apply. Generally, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the defendant. *Spotz*, 47 A.3d at 76 (citing *Commonwealth v. Hutchinson*, 611 Pa. 280, 295, 25 A.3d 277, 285 (2011)). To obtain relief, the defendant must demonstrate that counsel's performance was deficient and that deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). A defendant 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." *Id.* at 694, 104 S. Ct. at 2068; *Commonwealth v. Mallory*, 596 Pa. 172, 201, 941 A.2d 686, 704 (2008). Applying the *Strickland* performance and prejudice test, the Pennsylvania Supreme Court has noted that a properly pled claim of ineffective assistance of counsel posits that: "(1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice because of counsel's action or inaction." *Spotz*, 47 A.3d at 76.

In evaluating a properly presented claim of ineffective assistance of counsel, a reviewing court will examine the basis for counsel's action only if it is first persuaded that the course of action forgone had arguable merit. *Commonwealth v. Pursell*, 555 Pa. 233, 255-56, 724 A.2d 293, 304 (1999). If the claim is without merit, the inquiry ends because

counsel will not be deemed ineffective for failing to pursue a meritless, baseless or frivolous claim. *Commonwealth v. Rega*, 593 Pa. 659, 696, 933 A.2d 997, 1019 (2007).

In evaluating the second prong of the standard which requires an examination of counsel's conduct, the court must not employ a hindsight evaluation that examines whether other actions were more reasonable. *Commonwealth v. Zook*, 585 Pa. 11, 26, 887 A.2d 1218, 1227 (2005). Rather, a court must deem counsel to have been effective so long as the course which counsel chose was not unreasonable in acting to effectuate his or her client's interests. *Id.* Thus, a party must demonstrate that counsel's strategy was "so unreasonable that no competent lawyer would have chosen that course of conduct." *Commonwealth v. Chmiel*, 585 Pa. 547, 614, 889 A.2d 501, 541 (2005) (citing *Commonwealth v. Williams*, 537 Pa. 1, 29, 640 A.2d 1251, 1265 (1994)).

The third prong of the standard is of greatest significance. The Pennsylvania Supreme Court has consistently held that if the party asserting the claim has not established the prejudice prong, the claim may be dismissed on that basis alone without a determination of whether the party met the first two prongs of the standard. *Chmiel*, 585 Pa. at 613, 889 A.2d at 540; *Commonwealth v. Brown*, 582 Pa. 461, 481, 872 A.2d 1139, 1150 (2005); *Commonwealth v. Travaglia*, 541 Pa. 108, 118, 661 A.2d 352, 357 (1995). This "prejudice inquiry requires consideration of the totality of the evidence." *Commonwealth v. Spatz*, 582 Pa. 207, 228 n.15, 870 A.2d 822, 835 n.15 (2005) (quoting *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069) (internal quotation marks omitted). Only in the absolute rarest of circumstances, those where counsel completely failed to oppose the prosecution's case, for example, may prejudice be presumed. *Id.* at 227, 870 A.2d at

834 (citing *Florida v. Nixon*, 543 U.S. 175, 179, 125 S. Ct. 551, 555 (2004); *Bell v. Cone*, 535 U.S. 685, 696-97, 122 S. Ct. 1843, 1851 (2002); *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047 (1984)). The defendant must demonstrate that “there is a reasonable probability that the result of the proceeding would have been different absent [counsel’s] error.” *Commonwealth v. Lesko*, 609 Pa. 128, 176, 15 A.3d 345, 373 (2011). That is, there must be a “reasonable probability that the outcome of the proceedings would have been different had counsel not been ineffective in the relevant regard – *i.e.*, that the defendant was prejudiced as a result of counsel’s act or omission.” *Commonwealth v. Dennis*, 597 Pa. 159, 175, 950 A.2d 945, 954 (2008).

“A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.” *Commonwealth v. Bedell*, 954 A.2d 1209, 1211 (Pa. Super. 2008) (quoting *Commonwealth v. Bryant*, 579 Pa. 119, 136, 855 A.2d 726, 736 (2004)).

As fact finder in a proceeding for post conviction relief that is based on a claim of ineffective assistance of counsel, the credibility of witnesses remains exclusively within the province of the hearing court. *Commonwealth v. Pate*, 421 Pa. Super. 122, 132, 617 A.2d 754, 760 (1992) (citing *Commonwealth v. Moore*, 321 Pa. Super. 442, 450-51, 468 A.2d 791, 795 (1983)). An appellate court, therefore, “must give great weight to the findings of a lower court concerning the credibility of witnesses in a post-conviction proceeding.” *Commonwealth v. Dupert*, 555 Pa. 547, 557, 725 A.2d 750, 755 (1999) (citing *Commonwealth v. Madison*, 501 Pa. 485, 491, 462 A.2d 228, 231 (1983)).

In this case, Defendant argues that his trial counsel was ineffective for failing to request the identities of the two confidential informants cited in the affidavit of probable

cause in the application for the search warrant and for failing to challenge the reliability of those confidential informants.

In February and March, 2008, Detective Gregory P. Macey of the Lancaster County Drug Task Force spoke with two confidential informants who stated that they had purchased heroin from Edwin Perez at 516 West Vine Street in the City of Lancaster. (Aff. of Prob. Cause, ¶¶ 3, 5). Each informant independently identified Mr. Perez and his vehicle. (*Id.*, ¶¶ 4, 6). During the week of March 9, 2008, the second confidential informant made two controlled buys of heroin from Mr. Perez at 516 West Vine Street under the supervision of the Drug Task Force. (*Id.*, ¶¶ 8-9). Within 12 hours prior to applying for the search warrant, Detective Macey spoke with each of the confidential informants separately, who each told him that Mr. Perez had recently brought a large quantity of heroin into the home on West Vine Street, and was preparing to process it. (*Id.*, ¶ 10). On the basis of all of this information, police applied for and were granted a warrant to search 516 West Vine Street on March 17, 2008.⁷

In order to prevail on a motion to compel the identity of the two confidential informants, Defendant would have to show that “the information sought is material to the preparation of the defense and that the request is reasonable.” *Commonwealth v. Watson*, No. 1435 EDA 2011 (Pa. Super. May 1, 2013). Defendant claims that trial counsel was ineffective for failing to pursue such a motion since it deprived him of the ability to

⁷Defendant has not asserted that the information contained in the affidavit for the search warrant was stale.

challenge the reliability of the confidential informants regarding a possibly inconsistent statement made by Mr. Perez at trial.⁸

Defendant contends that at trial Mr. Perez claimed Defendant brought the heroin to the residence on the date of the search by police which is contrary to the information furnished by the confidential informants to Detective Macey. Each informant independently told the detective that Mr. Perez brought the heroin to the home within 12 hours prior to the application for the warrant.

If Defendant were able to prove the statements made by the confidential informants regarding when and by whom the heroin was brought to the residence were false,⁹ those statements would be removed from the affidavit of probable cause, and probable cause would be determined by the remaining information in the affidavit. *Commonwealth v. West*, 937 A.2d 516, 529-530 (Pa. Super. 2007). In this instance, the affidavit of probable cause would still contain information of prior sales by Mr. Perez in February and March to the two confidential informants as well as the two controlled buys of heroin supervised by Detective Macey. These controlled buys are sufficient to establish probable cause to issue a warrant to search the residence. *Commonwealth v. Clark*, 611 Pa. 601, 613, 28 A.3d 1284, 1292 (2011).

At the hearing on Defendant's amended motion, trial counsel testified that he thought the affidavit was sufficient to support probable cause for issuing the warrant due

⁸Mr. Perez was called as a witness by the Commonwealth at trial.

⁹It may be that neither the statements of the confidential informants nor that of Mr. Perez were false. Both Mr. Perez and Defendant may have brought heroin to the residence, but at different times. Mr. Perez testified at trial that he and Defendant were engaged in the purchase, packaging and sale of heroin together. (N.T. September 10, 2009, 114-120, 122, 132-133).

to the statements made by each of the confidential informants and the evidence of the controlled buys overseen by Detective Macey. (N.T., February 26, 2013, 6-8). Trial counsel reasoned that even if the confidential informants' statements were untrue concerning the arrival of additional heroin and thus removed from the affidavit of probable cause, the two controlled buys were enough to establish probable cause for issuing the search warrant. (*Id.*, at 9, 13). Defendant has produced no evidence that the affiant, Detective Macey, willfully misstated any of the facts in the affidavit of probable cause, and trial counsel testified that it was his opinion that everything contained in the affidavit was true. (*Id.* at 9-10, 14-15).¹⁰

Counsel further testified that he chose not to compel the Commonwealth to reveal the identity of the confidential informants because, in counsel's opinion, the information included in the affidavit of probable cause for the search warrant was truthful, and he felt the testimony of the confidential informants was irrelevant because they were not a material part of his trial strategy. (*Id.*, at 12, 18-19).

Since Defendant has the burden of proof, it is insufficient to suggest that one of the two versions is incorrect and simply invite the Court to speculate as to which one. Even if the questioned statements made by the confidential informants were eliminated from consideration, the affidavit of probable cause would still contain the recitation of the prior purchases and the two controlled buys which is sufficient information to establish probable

¹⁰Notwithstanding the possibility of police misconduct in obtaining search warrants as expressed by counsel, there is absolutely no evidence of any such conduct with respect to the warrant at issue.

cause. *Clark*, 611 Pa. at 613, 28 A.3d at 1292. Therefore, trial counsel cannot be found ineffective for failing to pursue a meritless claim.

Other than disagreeing with his former attorney's trial strategy, Defendant has presented nothing to support his claims of ineffective assistance of counsel. Moreover, Defendant engages in a hindsight review of trial counsel's strategy. Trial counsel cannot be found ineffective merely because the chosen strategy resulted in an unfavorable outcome for Defendant. The record demonstrates that counsel exercised appropriate professional judgment in determining that a challenge to the four corners of the search warrant lacked merit and Defendant is not entitled to relief.

For the reasons stated, the Court concludes that Defendant has failed to sustain his burden to establish that his attorney was ineffective for failing to pursue at trial the two issues presented. Accordingly, the Court enters the following:

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
C R I M I N A L

COMMONWEALTH OF PENNSYLVANIA :

vs. :

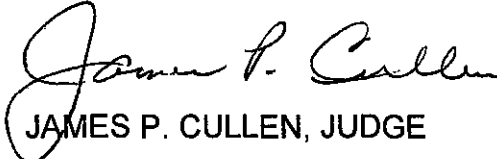
KELVIN MONSANTO :

No. 1713-2008

ORDER

AND NOW, this 22nd day of July, 2013, Defendant's amended motion for post conviction for collateral relief is denied.

BY THE COURT:


JAMES P. CULLEN, JUDGE

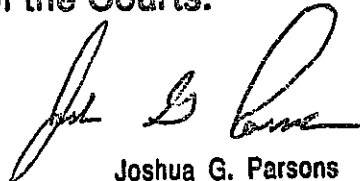
Attest:

Copies to:

Office of the District Attorney
R. Russell Pugh, Esquire

**I certify this document to be filed
in the Lancaster County Office of
the Clerk of the Courts.**




Joshua G. Parsons
Clerk of the Courts