

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

OMAR PAYNE

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1837 EDA 2012

Appeal from the PCRA Order of June 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No.: CP-51-CR -0006394-2007

BEFORE: STEVENS, P.J.,** WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.:

FILED SEPTEMBER 20, 2013

Omar Payne ("Appellant") appeals from the June 1, 2012 order denying his petition for relief pursuant to the Post-Conviction Relief Act ("PCRA"). **See** 42 Pa.C.S. §§ 9541-46. We affirm.

The PCRA court set forth the factual and procedural history of this case as follows:

On December 26, 2006, at approximately 1:00 PM, Tyree Humphrey (Humphrey), Tyrone Kegler (Kegler), Norman Lott White (White), and a male identified only as Paris, were standing together talking in front of German Groceries (the store), a grocery store located on the corner of 53rd and Delancey Streets in the City and County of Philadelphia. The four had just exited

* Retired Senior Judge assigned to the Superior Court.

** President Judge Stevens did not participate in the consideration or decision of this case.

the store. While still inside the store, Humphrey noticed a white Saturn pull over and stop in the middle of 53rd Street as if someone was just going to run into the store and come right back out. There were two people in the car, a female, later identified as Robin Payne, in the driver's seat and a male, later identified as [Appellant], in the passenger seat. Appellant was wearing dark jeans and a light colored hoodie. Appellant exited the vehicle, walked past Kegler and the others, and walked into the store, then exited again. When [Appellant] exited the store, he had a gun in his hand. Appellant stood in front of White, pointed the gun at him and mumbled something that sounded like "Nigger, remember me?" Kegler turned and ran down 53rd Street toward Pine Street and Humphrey ran back inside the store. As they ran, they heard three to six gunshots. When Humphrey came back out of the store, he found White lying on the ground, gasping for air and observed the white car pull off of Delancey Street and make a right turn.

Nasir Baynes, a resident of the neighborhood, was inside a cell phone store located at 53rd and Spruce Street, about one hundred yards away, when he heard gunshots. He looked in the direction of the gunfire and observed the white Saturn in the middle of 53rd Street and a male, wearing a gray hoodie, come from Delancey Street and enter the car on the passenger side. The male was looking toward the corner of Delancey Street, holding his arm up at a ninety[-]degree angle to his body, pointing in the direction of Delancey Street at the same time Baynes heard the gunfire. After the male entered the white vehicle, the car accelerated away, down 53rd Street making a left onto Spruce Street toward 54th Street. Baynes flagged down SEPTA Transit Police Officer, Edward Brinkman[,], who was travelling westbound on 53rd Street in his marked patrol car, and told Officer Brinkman that a male had been shot. Officer Brinkman proceeded to 53rd and Delancey Street where he was directed to the location of the body by several members of the crowd that had gathered. Officer Brinkman observed White on the ground, unresponsive but breathing, and called for rescue on his SEPTA police radio. He also observed two fired cartridge casings in a puddle near White's body. Rescue arrived and transported White to the Hospital of the University of Pennsylvania where he was pronounced dead at 1:34 PM. An autopsy determined the cause of death to be multiple gunshot wounds, one of which caused damage to White's heart, lungs

and spinal cord. A bullet was recovered from White's chest and submitted to the police for analysis.

Philadelphia Police Officer Mario Ransome and his partner[,] Officer Newsome[,] were stopped at a red light at 53rd and Pine Streets when they heard gunshots coming from the 53rd and Delancey Street area. Officer Ransome observed a white Saturn fleeing and several people pointing at the vehicle. The officers pursued the Saturn in their police vehicle, giving flash information over police radio indicating the color of the Saturn and the direction the Saturn was travelling. Officer Ransome and Officer Newsome pursued the Saturn, staying within several feet of the vehicle, until it lost control and crashed into a tree in the front yard of 245 Melville Street. Officers Ransome and Newsome, accompanied by two other Philadelphia Police Officers who had responded to the flash, Officer Billy Golphin and Officer Davila, approached the crashed Saturn with their weapons drawn. Officer Ransome forced the driver's door and removed Robin Payne. He then noticed a black handgun wedged between the console and the passenger's side seat. The handgun was made safe and returned to its original location to be collected by the Crime Scene Unit. Officer Golphin removed [Appellant] through the passenger's side window as the passenger door was wedged shut due to the collision. Both [Appellant] and Robin Payne were transported to the Homicide Unit for questioning.

Detective Joseph Centeno and Detective John Rossiter interviewed [Appellant] at Homicide. Prior to taking [Appellant's] statement, Detective Centeno administered both oral and written **Miranda** warnings. Appellant signed across each warning as read by Detective Centeno and dated the form, 12/26/06, 2:50 PM. Detective Centeno then asked [Appellant] the questions from police form 75-331E. Appellant initialed each answer and signed and dated the bottom of the page, 12/26/06, 2:53 PM. Appellant then gave the detectives a statement indicating that he had gone inside the store to purchase something to eat, but while inside, his sister called and indicated that she was outside the store. Appellant then exited the store without making a purchase. There were five males outside the store when he exited. As he walked by, the male that was shot (White) said "you ain't going to say excuse me?" Appellant kept walking toward Robin Payne's car, but kept his eye on the male. According to [Appellant], he saw White pulling a gun from his waist. Appellant pulled his gun and they exchanged gunfire. Appellant got into the car and they drove off. Upon completion

of the three[-]page statement, [Appellant] was given an opportunity to review the statement, but made no additions or corrections. Appellant signed and dated the bottom of each page of the statement. The interview concluded at approximately 4:23 PM.

Officer John Taggart of the Crime Scene Unit and his partner, Officer Clyde Frazier, processed the crime scene at 53rd and Delancey, and the crash site at 245 Melville Street. At 53rd and Delancey Streets, Officer Taggart photographed the scene and recovered ballistic evidence from the corner of 53rd and Delancey Street: three fired cartridge casings (FCC's) and three copper fragments. They also photographed the scene at 245 Melville Street and recovered the black handgun from the center console closest to the passenger's side inside the white Saturn. The gun, a black Sig Saur nine millimeter semiautomatic with one live round in the chamber and three live rounds in the magazine, was placed on a property receipt and submitted to the Firearms Identification Unit along with the ballistic evidence from Delancey Street. Officer Louis Grandizio of the Firearms Identification Unit analyzed the firearm and the ballistics evidence. He identified the gun as a Sig Saur nine millimeter Luger, semi-automatic pistol, Model 225, with a serial number of M624298. The FCC's recovered from the corner of 53rd Street were determined to be nine millimeter, the same caliber as the firearm and the bullet removed from White's chest was also nine millimeter Luger. Officer Grandizio's microscopic analysis of the FCC's determined that they exhibited similar but insufficient corresponding microscopic markings to determine if they were fired in the recovered firearm or the same firearm as each other to a degree of scientific certainty. The bullet and the bullet jacket specimens also exhibited insufficient markings to permit an identification. However, Officer Grandizio was able to determine that the FCC's had been chambered and extracted in the recovered firearm, meaning that the microscopic markings showed that they had been loaded into the chamber of the firearm and removed, but not fired.

Detective Centeno interviewed Tyree Humphrey, one of the individuals with the group, on January 2, 2007, during the course of his investigation of White's homicide. Humphrey told Detective Centeno that [Appellant] had walked past him and the others as [Appellant] exited the store. According to the statement, when [Appellant] exited the store, he saw a gun in [Appellant's] hand and heard [Appellant] mumble something

that he could not understand before he heard gunshots. At trial, Humphrey testified that he heard [Appellant] say, "Nigger, remember me." Detective Centeno testified that Humphrey had not indicated to him that he heard what [Appellant] had said during the interview on January 2, 2007 or during the trial preparation session held in that District Attorney's office earlier in April. Following presentation of all of the evidence, the jury found [Appellant] guilty of first-degree murder, carrying a firearm without a license, and possession of an instrument of crime.¹ Appellant was sentenced to life imprisonment without parole for first-degree murder, with a consecutive 2 ½ - 5 years['] incarceration for carrying a firearm without a license, and 1 to 2 years['] incarceration for possession of an instrument of crime, to be served concurrent[ly] to the previous two sentences. Post[-]sentence motions were filed and denied. Appellant's judgment of sentence was affirmed by the Superior Court on February 25, 2010, and his petition for allowance of appeal to the Pennsylvania Supreme Court was denied on August 31, 2010.

¹ 18 Pa.C.S. § 2502; 18 Pa.C.S. § 6106; and 18 Pa.C.S. § 907, respectively.

On June 6, 2011, [Appellant] filed the instant petition for relief and PCRA counsel was appointed. However, on December 21, 2011, prior to the filing [of] an amended petition, [Appellant] retained new counsel and appointed counsel was withdrawn. Retained counsel subsequently filed an amended PCRA petition complaining of six instances of trial counsel ineffectiveness and requesting an evidentiary hearing. The Commonwealth responded with a motion to dismiss, asserting that the claims, in addition to being improperly presented, were lacking in arguable merit. The Court evaluated the submissions of counsel, the Commonwealth's motion to dismiss, the record and the applicable law and determined that [Appellant] had failed to state a claim which entitled him to PCRA relief. Following proper notice, [Appellant's] petition for relief was formally dismissed [without a hearing] on June 1, 2012.

Trial Court Opinion ("T.C.O."), 11/30/2012, at 1-7 (some quotation marks removed for consistency).

On June 27, 2012, Appellant filed a notice of appeal. On October 31, 2012, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied on November 16, 2012. On November 30, 2102, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a). Thus, this case is ripe for our consideration.¹

Appellant raises the following six issues for our consideration:

- I. Is [Appellant] entitled to post-conviction relief since trial counsel failed to renew his request for a mistrial, request a contemporaneous curative instruction to be given and/or preserve for or argue on appeal the claim that the trial court abused its discretion and violated [Appellant's] rights when it denied his request for a mistrial after Tyree Humphrey testified that [Appellant] had said, "Remember me, nigger?"
- II. Is [Appellant] entitled to post-conviction relief since trial counsel failed to raise at trial and preserve for appeal a claim that the trial court violated [Appellant's] constitutional rights by accepting the prosecutor's unsworn attestation as fact that she did not fail to disclose to the defense, pursuant to **Brady v. Maryland**, that Tyree Humphrey heard [Appellant] ask the victim prior to shooting him "Remember me, nigger?"
- III. Is [Appellant] entitled to post-conviction relief since trial counsel failed to raise at trial, request a contemporaneous curative instruction and/or preserve for appeal a claim that

¹ We note that the Commonwealth has failed to file a brief in this matter. On January 23, 2013, we entered an order granting the Commonwealth an extension of time to file its brief. We noted that no further extensions would be granted. The Commonwealth heeded our command, and did not file another request for an extension. Unfortunately, the Commonwealth also failed to file a brief.

the trial court violated [Appellant's] rights by failing to grant a mistrial when an audience member prejudicially shouted a comment related to [Appellant's] credibility in front of the jury?

- IV. Is [Appellant] entitled to post-conviction relief since trial counsel improperly advised [Appellant] not to testify at trial?
- V. Is [Appellant] entitled to post-conviction relief since trial counsel failed to object to the admission of knowingly false and inconsistent testimony from Tyrone Kegler and appellate counsel was constitutionally ineffective for failing to assert on appeal that the prosecution violated [Appellant's] constitutional rights by permitting known perjurious testimony to go uncorrected?
- VI. Is [Appellant] entitled to post-conviction relief since trial counsel failed to request the trial court to specifically charge the jury on mistaken belief voluntary manslaughter?

Brief for Appellant at 5.

The following principles govern our analysis. The “standard of review for an order denying post-conviction relief is limited to whether the record supports the post-conviction court’s determination, and whether that decision is free of legal error.” **Commonwealth v. Allen**, 732 A.2d 582, 586 (Pa. 1999). The PCRA court’s findings “will not be disturbed unless there is no support for the findings in the certified record.” **Commonwealth v. Johnson**, 945 A.2d 185, 188 (Pa. Super. 2008). A PCRA court may dismiss a PCRA petition without a hearing when that court is satisfied “that there are no genuine issues concerning any material fact, the defendant is not entitled to post-conviction collateral relief, and no legitimate purpose would be served by any further proceedings.” **Commonwealth v.**

Hutchinson, 25 A.3d 277, 285 (Pa. 2011) (quoting Pa.R.Crim.P. 909(B)(2)). “[T]o obtain reversal of a PCRA court’s decision to dismiss a petition without a hearing, an appellant must show that he raised a genuine issue of fact which, if resolved in his favor, would have entitled him to relief, or that the court otherwise abused its discretion in denying a hearing.”

Commonwealth v. D’Amato, 856 A.2d 806, 820 (Pa. 2004).

Each of Appellant’s claims raises a challenge to the effectiveness of his trial counsel. “[T]rial counsel is presumed to be effective and the burden to show otherwise lies with the [Appellant].” **Commonwealth v. Singley**, 868 A.2d 403, 411 (Pa. 2005) (citing **Commonwealth v. Jones**, 683 A.2d 1181, 1188 (Pa. 1996)). The applicable test for ineffectiveness of counsel is as follows:

[T]he appellant must overcome the presumption of competence by showing that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel’s ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different.

Commonwealth v. Bomar, 826 A.2d 831, 855 (Pa. 2003) (citing **Commonwealth v. Kimball**, 724 A.2d 326, 333 (Pa. 1999)). Failure to satisfy any prong of the above test will result in the rejection of the underlying claim. **Jones**, 811 A.2d at 1002.

Appellant has raised six allegations of ineffective assistance of counsel. As noted above, prejudice is an essential element to making out such a

claim. If an appellant is unable to demonstrate prejudice, the other two elements need not be addressed. ***Commonwealth v. Albrecht***, 720 A.2d 693, 701 (Pa. 1998). We have reviewed Appellant's arguments and have discovered that Appellant, in each instance, offers nothing more than a boilerplate allegation of prejudice. ***See*** Brief for Appellant at 30 ("But for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceeding would have been different."), 35 (same), 40 (same), 43 (same), 48 (same), and 52 (same). Appellant offers no meaningful discussion of prejudice as it relates to his individual claims. By way of example, Appellant does not discuss how a curative instruction, which he alleges trial counsel was ineffective for failing to request regarding the inflammatory statements offered by Tyree Humphrey, would have affected the jury's consideration of the substantial evidence of Appellant's guilt. Similarly, Appellant never discusses how his self-defense testimony, had his counsel not advised him against testifying, would have balanced or overcome the testimony offered by the Commonwealth, creating any likelihood of a different verdict. Appellant makes the same or similar omissions in his argument for each of his six claims.

Appellant's boilerplate allegations of prejudice are insufficient to satisfy his burden of proving ineffectiveness. ***See Commonwealth v. Steele***, 961 A.2d 786, 797 (Pa. 2008) ("[U]ndeveloped claims, based on boilerplate allegations, cannot satisfy [the appellant's] burden of establishing ineffectiveness.") (citing ***Commonwealth v. Jones***, 876 A.2d 380, 386 (Pa.

2005); ***Commonwealth v. Bracey***, 795 A.2d 935, 940 n.4 (Pa. 2001)).

Because the absence of any of the ineffectiveness prongs precludes relief, each of Appellant's claims fail.

PCRA order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gambetti", written over a horizontal line.

Prothonotary

Date: 9/20/2013