NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KENYATTA GENE BROOKS,	:	
Appellant	:	No. 1821 MDA 2018

Appeal from the PCRA Order Entered October 18, 2018
in the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0006494-2014

BEFORE: STABILE, J., MURRAY, J., and MUSMANNO, J.

MEMORANDUM BY MUSMANNO, J.: **FILED JUNE 20, 2019**

Kenyatta Gene Brooks ("Brooks") appeals from the Order dismissing his first Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA").[1] We affirm.

In its Opinion, the PCRA court set forth the relevant procedural history as follows:

> [Brooks] was charged with four counts of unlawful delivery of a controlled substance, as well as the charge of criminal use of communication facility[,] on November 18, 2014. While represented … [Brooks] proceeded to a jury trial. On March 17, 2016, [Brooks] was found guilty of three counts of unlawful delivery of a controlled substance and criminal use of communication facility, and was sentenced on March 31, 2016[,] to an aggregate sentence of three and one half [] years to fifteen [] years [in prison].
>
> [Brooks], through his attorney, … filed a timely Post-Sentence Motion on April 8, 2016. The Motion was denied on April 18, 2016 and [Brooks's Attorney] filed a Petition to Withdraw.

---

[1] ***See*** 42 Pa.C.S.A. §§ 9541-9546.

> [The Petition to Withdraw was granted], and on May 18, 2016, … the Public Defender's Office filed a Notice of Appeal to the Superior Court. The Superior Court affirmed [Brooks's] judgment of sentence on May 8, 2017, and [Brooks] did not pursue *allocat[u]r* to the Supreme Court of Pennsylvania. On June 2, 2017[,] [Brooks] filed a *pro se* [P]etition for relief pursuant to the Post [] Conviction Relief Act and [was appointed counsel.] A PCRA hearing was held on July 9, 2018.

PCRA Court Opinion, 10/18/18, at 1. Thereafter, the PCRA court dismissed Brooks's Petition for lack of arguable merit. ***See id.*** at 4-5, 7-8.

On appeal, Brooks raises the following claim for our review:

> "The PCRA [c]ourt erred when it declined to conclude that trial counsel's failure to accurately advise [Brooks] of the admissibility of his prior criminal record[,] which in turn led [] trial counsel to argue that [Brooks] testifying in his own defense was not in [Brooks's] best interest[,] and led to [Brooks] unknowingly, unintelligently and involuntarily waiving the right to testify on his own behalf, was ineffective assistance of counsel.

Brief for Appellant at 2-3.

Our standard of review regarding an order dismissing a PCRA petition is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. ***Commonwealth v. Ortiz***, 17 A.3d 417, 420 (Pa. Super. 2011). "The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Id.***

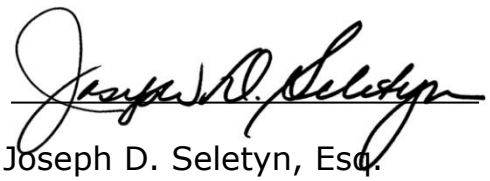
Brooks asserts that his counsel's advice not to testify was misguided and unreasonable. Brief for Appellant at 10. Specifically, Brooks contends that the reason cited by counsel for refraining from testifying—*i.e.* concern that evidence of Brooks's prior criminal conduct could have been inquired into by way of his testimony "opening the door" to such evidence—was illegitimate, as the evidence would not have been admissible at trial. ***Id.*** Therefore,

Brooks claims that the decision not to testify in his own defense was the product of unreasonably inaccurate advice, and, had counsel correctly advised him, Brooks would have testified. ***Id.*** at 11.

The PCRA court set forth the relevant law, considered Brooks's claim, and determined that it is without merit. PCRA Court Opinion, 10/18/18, at 2-8. Upon our review of the record, we agree, and adopt the sound reasoning of the PCRA court. ***See id.*** Thus, the PCRA court properly dismissed Brooks's Petition.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 06/20/2019

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS : DAUPHIN COUNTY, PENNSYLVANIA
vs.	: NO. 6494-CR-2014
KENYETTA BROOKS	:

MEMORANDUM ORDER AND OPINION

Defendant was charged with four counts of Unlawful Delivery of a Controlled Substance, as well as the charge of Criminal Use of Communication Facility on November 18, 2014. While represented by attorney Christopher F. Wilson, Defendant proceeded to a jury trial. On March 17, 2016 the Defendant was found guilty of three counts of Unlawful Delivery of a Controlled Substance and Criminal Use of Communication Facility, and was sentenced on March 31, 2016 to an aggregate sentence of three and one half (3.5) years to fifteen (15) years of incarceration in a State Correctional Institution.

The Defendant, through his attorney, Christopher F. Wilson filed a timely Post-Sentence Motion on April 8, 2016. The Motion was denied on April 18, 2016 and Attorney Wilson filed a Petition to Withdraw. This Honorable Court granted Attorney Wilson's Petition, and on May 18, 2016, attorney James Karl, Esquire for the Public Defender's Office filed a Notice of Appeal to the Superior Court. The Superior Court affirmed the Defendant's judgment of sentence on May 8, 2017, and the Defendant did not pursue allocator to the Supreme Court of Pennsylvania. On June 2, 2017 Defendant filed a pro se petition for relief pursuant to the Post-Conviction Relief Act and Attorney Aaron N. Holt was appointed to represent the Defendant in his quest for pos-conviction relief. A PCRA hearing was held on July 9, 2018.

In his Petition for Relief Under the PCRA Act, Defendant raises the following:

(1) This Petition presents a case of ineffective assistance of counsel which resulted in Petitioner making an unknowing, unintelligent, and involuntary waiver of his constitutional right to testify in his own behalf.

(2) Petitioner waived his right to testify under the mistaken belief that evidence of his prior criminal conviction history would be admissible should he testify in his own defense.

To prevail on a claim of ineffective assistance of counsel under the Post-Conviction Relief Act (PCRA), a "petitioner must plead and prove by a preponderance of the evidence" that counsel's ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. § 9453(a)(2)(ii). Specifically, a petitioner must establish that "the underlying claim has arguable merit; that counsel had no reasonable basis for his action or inaction; and that [petitioner] was prejudiced." *Commonwealth v. Charleston*, 94 A.3d 1012, 1020 (Pa. Super. 2014), appeal denied, 104 A.3d 523 (Pa. 2014) (quoting *Commonwealth v. Rolan*, 964 A.2d 398, 406 (Pa. Super. 2008)). Counsel is vested with the presumption of effectiveness and the burden of overcoming this presumption "rests with the petitioner." *Commonwealth v. Cox*, 983 A.2d 666, 678 (Pa. 2009) (quoting *Commonwealth v. Basemore*, 744 A.2d 717, 728 n. 10 (Pa. 2000)). In order to meet this burden, a petitioner's claims "must meet all three prongs of the test for ineffectiveness," and once it is determined that "any one of the prongs has not been established, counsel's assistance is deemed constitutionally effective." *Charleston*, 94 A.3d at 1020 (quoting *Commonwealth v. Jones*, 942 A.2d 903, 906 (Pa. Super. 2008), appeal denied, 956 A.2d 433 (Pa. 2008); *Rolan*, 964 A.2d at 406. In determining whether counsel's action lacked reasonable basis, adjudicative strategy will

not be held unreasonable, unless it is proven that "an alternative not chosen offered a potential for success substantially greater than the course actually pursued." *Cox*, 983 A.2d at 678; *Commonwealth v. Williams,* 899 A.2d 1060, 1064 (Pa. 2006) (quoting *Commonwealth v. Howard,* 719 A.2d 233, 237 (Pa. 1998)). Additionally, in this vein, prejudice is defined as "a reasonable probability that, but for, counsel's error, the outcome of the proceeding would have been different." *Commonwealth v. Stewart*, 84 A.3d 701, 707 (Pa. Super. 2013).

In this case, Petitioner argues that counsel Attorney Wilson was ineffective when he advised Petitioner that testifying on his own behalf was against the Petitioner's best interest; and that this advice lead to the Petitioner's making of an unknowing, unintelligent, and involuntary waiver of his constitutional right to testify on his own behalf. The decision of whether or not to testify on one's own behalf is a decision "ultimately to be made by the defendant after full consultation with counsel." *Commonwealth v. Nieves*, 746 A.2d 1102, 1104 (Pa. 2000); *Commonwealth v. Uderra,* 706 A.2d 334, 340 (Pa. 1998); *Commonwealth v. Bazabe,* 590 A.2d 1298 (Pa. Super. 1991), *alloc. denied,* 598 A.2d 992 (Pa. 1991) (quoting *Commonwealth v. Fowler,* 523 A.2d 784 (Pa. Super. 1987)). In order to support a claim that counsel was ineffective for "failing to call the [defendant] to the stand," [the petitioner] must demonstrate that either: (1) "counsel interfered with his client's freedom to testify," or (2) that "counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf." *Commonwealth v. Thomas*, 783 A.2d 328, 334 (Pa. Super. 2001) (quoting *Commonwealth v. Preston,* 613 A.2d 603, 605 (Pa. Super. 1992), *appeal denied,* 625 A.2d 1192 (1993); *see also Bazabe,* 590 A.2d at 1301. Furthermore, a Petitioner's bare assertion of "strategic error" that is devoid of any "specific incidents of counsel's impropriety," will not meet the requisite showing. *Thomas*, 783 A.2d at 334, (quoting *Preston*, 613 A.2d at 605)).

In this case, Petitioner argues that counsel's advice not to testify was so unreasonable as to vitiate a knowing and intelligent decision, and that because of his reliance on this unreasonable advice, counsel interfered with Petitioner's freedom to testify. At the outset we recognize that but for this reliance interest, Petitioner points to no specific impropriety of counsel that actually interfered with his freedom to testify. Furthermore, the colloquy which was taken during Petitioner's trial is illustrative on the disposition of this issue, and demonstrates that both the Court and Defense Counsel apprised Defendant of the knowledge and freedom to decide whether or not to testify, and that such decision was to be made irrespective of counsel's advice.

THE COURT: ...However, with the case coming back to the defense, you, the defendant have certain constitutional rights. You have the constitutional right not to testify, if you want me, if you do not wish to testify, I will be happy to tell the jury, so long as you and your counsel want me to, that they cannot hold it against you, and that is because the burden of proof always lies...

THE DEFENDANT: On the Commonwealth.

THE COURT: -- with the Commonwealth...The Commonwealth can't call you as a witness to testify; I can't direct that you testify. That's a decision to be left to you. On the other side of the coin, you have the constitutional right to testify if you do want to testify. If you choose to testify, obviously, the Commonwealth has the right to cross-examine you. So this is a decision that is for you to make. You have counsel with you, but it is not your counsel's decision. That's the reason we are putting this on the record.

THE DEFENDANT: I know. We already discussed. He said he didn't want me to testify.

MR. WILSON: It is ultimately your decision.

THE DEFENDANT: And I agreed to it.

THE COURT: But that's why I am asking you now if you have had ample time to think about it.

THE DEFENDANT: Plenty.

THE COURT: What is your decision? What do you want to do?

THE DEFENDANT: I will follow my counsel. Whenever he says something, I'll look into it, and then I come back and tell him. You know what I mean? He said he didn't want me to and he explained why, and so I started looking into it, and it was in my best interest, so...

THE COURT: Okay. So your decision is you do not want to testify?

THE DEFENDANT: Correct.

THE COURT: Okay. Then here we go. That's what we have to put on the record. [Trial Tr. Vol. 3, 88:1- 89:15].

In light of this record, and the many affirmations by Counsel and The Court, in addition to the Defendant's own admissions that he had "plenty" of time to think about the decision, that "whenever counsel says something," the Defendant, "will look into it," then "come[s] back and tell[s] him," demonstrates sufficient evidence of a Defendant beholden of, and not deprived of, the freedom to testify. Furthermore, that Defendant did "start looking into it," and found "it was not in [his] best interest," further illustrates his freedom of decision on whether to testify in his own behalf. [Trial Tr. Vol. 3, 89:3, 89:6-10]. Therefore, because Petitioner points only to a reliance interest as evidence, and the colloquy on record shows that Petitioner was not actually impeded nor deprived of his freedom to testify, but made very aware of his rights, this argument must fail.

Turning now to the argument that counsel's advice was so unreasonable as vitiate a knowing and intelligent decision by the Defendant not to testify in his own behalf, we first look

to the advice itself. Petitioner argues that counsel's advice was predicated solely on Pa.R.E. 609; that the Commonwealth could introduce evidence of past criminal record, and that counsel's fear of impeachment is what ultimately guided the Defendant's decision not to testify. Defendant argues that this advice was unreasonable because of the rule's ten year lookback period, and because his crimen falsi occurred over ten years ago, the evidence would not have come in if he testified. Thus, because the information would not have come in, Defendant argues his decision not to testify was not made knowingly or intelligently. However, during the PCRA hearing on July 9, 2018, both the Petitioner and Attorney Wilson testified to having had conversations about whether or not the Defendant should testify, conversations specific to the lookback period, and conversations specific to the fact that Defendant's prior criminal history ultimately may not have come in. When the Defendant was asked whether Attorney Wilson ever told him there was a ten year lookback period to the crimen falsi, the Defendant testified, "[y]eah, he did say that. He told me there's a ten year lookback period;" and Attorney Wilson did say "there was a possibility that the information could ultimately be excluded." [Tr. of Proceedings PCRA, 17:11-16, 17:23-25]. When Attorney Wilson was asked whether he had a conversation with the Defendant, "letting him know that that information does not necessarily automatically come in at trial," Attorney Wilson explained that "after I would have gotten his prior record score, I would have discussed in that context of advising him concerning testimony to some extent. But the primary reason [against testifying] was not the crimen falsi. That's not why I advised him not to testify." [Tr. of Proceedings PCRA, 6:2-6]. Because the Defendant, and Counsel testified that there was a conversation about the lookback period, and about the potentiality for the Defendant's criminal record to be kept out of evidence, the advice given does not rise to the level of unreasonable, nor can it be said that the Petitioner's decision was made unknowingly.

Furthermore, at the evidentiary hearing, Attorney Wilson testified numerous times that the crimen falsi was not even his "primary concern" in determining that it was not in the Defendant's best interest to testify. [Tr. of Proceedings PCRA, 6:2-6]. Attorney Wilson did advise the Defendant as to "whether or not he should or should not testify;" and in so advising, his "primary reason" against calling the Defendant to testify "was the information in the audiotapes." [Tr. of Proceedings PCRA, 4: 9-12, 4:14-15]. Although Attorney Wilson had "other reasons" aside from the audiotapes, he was concerned that while the information "wouldn't automatically come in, it could;" the Defendant "could have potentially opened the door to other criminal conduct or convictions." [Tr. of Proceedings PCRA, 4:17-21]. When pressed on what those convictions were, Attorney Wilson reiterated that, "that wasn't my primary – my primary concern was not the convictions within the 10 years at all;" "depending on how [the defendant] answered" during cross examination, it "could potentially open the door." [Tr. of Proceedings PCRA, 4:22-5:7].

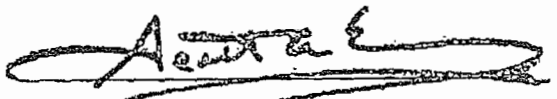
When the Defendant was asked what Attorney Wilson had advised on the subject of testifying, the Defendant stated that Attorney Wilson told him that it was "not in [his] best interest," to testify and that he "ultimately decided not to testify," because "Mr. Wilson told me it was in my best interest not to testify." [Tr. of Proceedings PCRA, 15:4-7, 15:14-17]. When asked what the "alternative reasons [that Attorney Wilson provided] as to why [he] should not testify," the Defendant stated that Attorney Wilson told him "the DA would tear me up on the stand," and that Attorney Wilson "did not think [he was] prepared for that." [Tr. of Proceedings PCRA, 16: 8-12].

In light of Defendant's testimony that Attorney Wilson employed advisory language, such as, "not in [his] best interest," nor "prepared" for cross examination, and the fact that the

audiotapes, not the crimen falsi, were Attorney Wilson's primary of several concerns in counseling his client not to testify, this Court finds unpersuasive Petitioner's argument that counsel's advice was unreasonable. In fact, advice by counsel not to testify would have been reasonable in light of the audio tapes and the Commonwealth's other evidence. Therefore, because counsel's advice not to testify was not unreasonable, it is not found to have vitiated Petitioner of a knowing and intelligent decision not to testify. Because counsel neither infringed upon Defendant's freedom to testify, nor vitiated him of a knowing decision, Petitioner's underlying claim of ineffectiveness lacks arguable merit and we may dispose of the second and third prongs of the test.

Based upon our review of the record Petitioner has failed to establish the prong that requires that the ineffectiveness of counsel so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place, Defendant's petition for post-conviction relief is hereby dismissed.

BY THE COURT:



Scott Arthur Evans, Judge

Distribution:

Ryan H. Lysaght, District Attorney's Office
Aaron N. Holt, Esquire, 800 N. 3rd Street, Suite 404, Harrisburg, PA 17102
Chambers of the Honorable Scott Arthur Evans