

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

WILLIAM E. CLEARY

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1643 MDA 2013

Appeal from the PCRA Order August 15, 2013  
In the Court of Common Pleas of Franklin County  
Criminal Division at No(s): CP-28-CR-0001220-2002

BEFORE: PANELLA, J., WECHT, J., and STRASSBURGER, J.\*

MEMORANDUM BY PANELLA, J.:

**FILED JULY 24, 2014**

Appellant, William E. Cleary, appeals from the order entered August 15, 2013, by the Honorable John R. Walker, Court of Common Pleas of Franklin County, which denied his petition filed pursuant to the Post Conviction Relief Act ("PCRA"). We affirm.

A panel of this Court on direct appeal recounted the history of this case as follows:

On July 6, 2002, at approximately 11:00 a.m., Appellant's estranged wife, Theresa Cleary, ran out of the front door of her residence at 423 West Main Street, Fayetteville, Franklin County, screaming for help. Appellant caught her in the front yard and stabbed her multiple times with a long-bladed kitchen knife, severing both of her jugular veins and her carotid artery. Eyewitnesses to the crime called 911, and a radio dispatch

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\* Retired Senior Judge assigned to the Superior Court.

informed the police that a stabbing occurred at 423 West Main Street.

Three Pennsylvania State Troopers arrived at the scene in different vehicles. The Troopers approached the scene with their weapons drawn, and they saw Theresa Cleary lying motionless on the ground with knife sticking out of her neck. Appellant was a few feet away, within reaching distance of the knife, and had open wounds to his neck. The Troopers holstered their weapons and moved Appellant a few feet away from Theresa Cleary and the knife. The Troopers then asked Appellant, "what happened?" Appellant replied, "We were supposed to get counseling, then her boyfriend moved in." The Troopers asked Appellant, "Who stabbed her?" and "Who stabbed you?" Appellant said that he stabbed the woman and also himself. The Troopers detained and questioned Appellant for less than one minute.

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Theresa Cleary died as a result of her injuries. The Commonwealth charged Appellant with first-degree murder. Following trial, on May 18, 2005, a jury convicted Appellant on this count. On June 22, 2005, the trial court sentenced Appellant to life imprisonment without the possibility for parole.

***Commonwealth v. Cleary*** [sic], 850 MDA 2010 at 1-3 (Pa. Super., filed Feb. 14, 2011) (unpublished memorandum). This Court affirmed Cleary's judgment of sentence on appeal. ***See id.***

On February 7, 2012, Cleary filed a timely PCRA petition. By agreement with the Commonwealth, the PCRA court permitted Cleary to file a petition of allowance of appeal with the Pennsylvania Supreme *nunc pro tunc* and held the PCRA petition in abeyance. The Supreme Court ultimately denied allocatur on November 29, 2012. ***Commonwealth v. Cleary***, 55 A.3d 522 (Pa. 2012) (Table). Following a PCRA hearing held on May 9, 2013, the PCRA court denied Cleary's petition. ***See*** PCRA Order, 8/16/13. This timely appeal followed.

On appeal, Cleary raises the following issues for our review:

- I. Was trial counsel ineffective for failure to object to the admission of testimony of the Commonwealth's witness, Gerald Bittinger?
- II. Were there errors, as identified below, regarding the testimony of the victim's son, Zachary Smith?
  - A. Did the trial court err in admitting the testimony?
  - B. Did the trial court err in not granting a mistrial after the testimony of Zachary Smith was admitted?
  - C. Did the trial court err in not instructing the jury to disregard the testimony?
  - D. Was trial counsel ineffective in its failure to request the court to strike the testimony?
- III. Was trial counsel's strategy, which included not calling the forensic psychiatric expert, Dr. Neil Blumberg, M.D., who would have testified to the defendant's state of mind at the time of the incident, so inadequate and would fall so far below acceptable constitutional standards of effectiveness of counsel as to constitute a violation of defendant's right to counsel?
- IV. Was trial counsel's failure to investigate and/or call any defense witnesses so inadequate and so far below acceptable constitutional standards of effectiveness of counsel as to constitute a violation of defendant's right to counsel?

Appellant's Brief at 4.

"On appeal from the denial of PCRA relief, our standard and scope of review is limited to determining whether the PCRA court's findings are supported by the record and without legal error." ***Commonwealth v. Edmiston***, 65 A.3d 339, 345 (Pa. 2013) (citation omitted), *cert. denied*, ***Edmiston v. Pennsylvania***, 134 S. Ct. 639 (2013). "[Our] scope of review

is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the prevailing party at the PCRA court level.” ***Commonwealth v. Koehler***, 36 A.3d 121, 131 (Pa. 2012) (citation omitted). In order to be eligible for PCRA relief, a petitioner must plead and prove by a preponderance of the evidence that his conviction or sentence arose from one or more of the errors listed at 42 Pa.C.S.A. § 9543(a)(2). These issues must be neither previously litigated nor waived. 42 Pa.C.S.A. § 9543(a)(3). “[T]his Court applies a *de novo* standard of review to the PCRA court’s legal conclusions.” ***Commonwealth v. Spatz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted).

To determine whether the PCRA court erred in dismissing Cleary’s claims of ineffectiveness of counsel, we turn to the following principles of law:

In order for Appellant to prevail on a claim of ineffective assistance of counsel, he must show, by a preponderance of the evidence, 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 ... Appellant must demonstrate: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her 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. Johnson***, 868 A.2d 1278, 1281 (Pa. Super. 2005).

Moreover, “[w]e presume counsel is effective and place upon Appellant the burden of proving otherwise.” ***Commonwealth v. Springer***, 961 A.2d

1262, 1267-1268 (Pa. Super. 2008). “This Court will grant relief only if Appellant satisfies each of the three prongs necessary to prove counsel ineffective.” **Commonwealth v. Natividad**, 595 Pa. 188, 208, 938 A.2d 310, 322 (2007). Thus, we may deny any ineffectiveness claim if “the evidence fails to meet a single one of these prongs.” **Id.**, 595 Pa. at 207-208, 938 A.2d at 321.

Cleary first argues that trial counsel was ineffective for failing to object to the testimony of Gerald Bittinger, which he claims improperly bolstered the credibility of Commonwealth witness Holly Funk. Appellant’s Brief at 7. Funk, who worked with Cleary, testified that several days before the murder Cleary informed her that he suspected his estranged wife was cheating on him and that he was “going to kill that fucking bitch.” N.T., Trial, 5/17/05 at 116. Funk admitted that she did not speak with the police about Cleary’s statements until January 2005—several years after the murder. **Id.** at 118. On cross-examination, defense counsel used Funk’s delay in reporting this information to police to impeach her credibility. **Id.** at 121-126.

The Commonwealth next called Gerald Bittinger, also a co-worker with both Cleary and Funk. Bittinger testified that in 2005 Funk had informed him that she did not relay to police Cleary’s statements because they had not specifically asked her about the statements. **Id.** at 130-131. Bittinger then took it upon himself to contact the District Attorney’s Office with the

information, after which the police interviewed Funk a second time. ***Id.*** at 132. Funk then informed police of Cleary's prior statements.

Cleary argues that the Commonwealth used Bittinger's testimony to improperly bolster Funk's credibility and explain why she did not inform police about Cleary's statements to her until over two years after the murder. Here, however, the defense first attacked Funk's credibility on cross-examination by inquiring why she did not tell police about the statements for over two years. Therefore, Bittinger's testimony properly served to rehabilitate Funk's credibility which the defense attempted to impeach. ***See, e.g., Commonwealth v. Tedford***, 960 A.2d 1, 32 (Pa. 2008) (officer's testimony that witness knew details of crime known only to murder was proper rehabilitation after defense impeachment implied witness learned details from media reports); ***Commonwealth v. Glover***, 405 A.2d 945, 947 (Pa. Super. 1979) (tape recording of rape properly admitted to rehabilitate victim's credibility after impeachment by defense on cross-examination). As Bittinger's testimony constituted proper and relevant rehabilitation testimony, trial counsel cannot be found ineffective for failing to object to it.

In his second issue on appeal, Cleary raises several challenges to the trial testimony of the victim's son, Zachary Smith. Cleary argues that the substance of Zachary Smith's testimony did not support the proffer made by the Commonwealth at trial. Appellant's Brief, at 9.

Preliminarily, we note that sub issues A., B., and C. raise allegations of trial court error. Cleary argues in issue II.A. that the trial court erred in admitting Zachary Smith's testimony. Cleary raised this issue on direct appeal,<sup>1</sup> and it is therefore not cognizable under the PCRA because it has been previously litigated. **See** 42 Pa.C.S. §§ 9543(a)(3) and 9544(a). In issues II.B. and II.C., Cleary argues the trial court erred in not granting a mistrial after Smith's testimony and in not instructing the jury to disregard the testimony. Appellant's Brief at 9-10. These issues, which could have been raised in the trial court or on direct appeal, but were not, are both waived and, thus, likewise not cognizable under the PCRA. **See** 42 Pa.C.S. §§ 9543(a)(3) and 9544(b).

Cleary argues in issue II.D. that trial counsel was ineffective for failing to request that the trial court strike Smith's testimony. Cleary summarizes his argument regarding the contested testimony thusly:

The proffer made by the Commonwealth as to Zachary Smith's testimony was, "I believe he's going to have knowledge, quotes that Matt was staying there" per Mr. Wilmot [for the Commonwealth]. (N.T. Second day of trial, Page 90, lines 13 and 14). The Defendant knew that Matt was there and I'm going to confirm that Matt was there." (N.T. Second day of trial, Page 90, lines 18 and 19).

Defense counsel at sidebar asked for a mistrial after Smith's testimony because it did not support the offer of proof made by the Commonwealth. Smith did not testify to any knowledge of Matt staying at the house or confirm that Matt was even there.

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<sup>1</sup> **See Cleary**, 850 MDA 2010 at 4.

Smith did testify about his mother being curled up in a ball. The Commonwealth then asked, "Where were you on Saturday morning and did your mom ever show up? The Court told the Commonwealth he had reservations about the real relevancy of Smith's testimony but was not granting a mistrial at this point and the Defense could take it up on appeal. (N.T. Second day of trial, Page 98, lines 17 and 18).

Appellant's Brief at 9.

Cleary's summation of the contested testimony is completely devoid of context. He fails to apprise this Court of who "Matt" is or the importance of this individual to the case. Although Cleary summarily posits that the testimony was presented solely to prejudice the jury, the evidence suggests that at worst the testimony was arguably irrelevant. Based on the record presented to us, we fail to see in what way Smith's testimony, while irrelevant, prejudiced Cleary. As Cleary has not established that the testimony was prejudicial, he cannot establish that the underlying claim is of arguable merit. Accordingly, we cannot find counsel to have been ineffective for failing to request the trial court strike the testimony.<sup>2</sup> This claim fails.

Cleary next argues that trial counsel was ineffective in failing to call as a witness Dr. Neil Blumberg, M.D., a forensic expert who would allegedly have testified as to Cleary's "state of mind at the time of the incident."

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<sup>2</sup> As noted, although trial counsel did not request that the trial court strike Smith's testimony, he did request a mistrial, which the court ultimately denied. As such, counsel clearly sought to cure what he saw as inappropriate testimony, albeit not in the manner in which Cleary appears to have preferred.



Appellant's Brief at 11. Trial counsel will not be deemed ineffective for failing to call a witness to testify unless it is demonstrated that:

(1) the witness existed; (2) the witness was available; (3) counsel knew of, or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial.

***Commonwealth v. Brown***, 18 A.3d 1147, 1160-1161 (Pa. Super. 2011) (citation omitted), ***appeal denied***, 611 Pa. 677, 29 A.3d 370 (2011).

In what has been characteristic of the arguments presented in Cleary's brief, we are presented with a bald claim, not provided with the evidence necessary to analyze the claim, and left to extrapolate a ruling on the merits of the claim. Cleary argues that counsel was ineffective in failing to call Dr. Blumberg as an expert witness regarding Cleary's state of mind when he murdered his estranged wife, but Cleary altogether fails to enlighten this Court as to the *substance* of the report Dr. Blumberg prepared. Although Cleary alleges that Dr. Blumberg's testimony would have negated premeditation, he provides no citation to the report nor provides any other basis to support Dr. Blumberg's conclusions. Without this necessary evidence we are unable to conclude that the "the absence of the testimony was so prejudicial to petitioner to have denied him or her a fair trial."

***Brown, supra.***

In addition to these omissions on appeal, Cleary's argument also fails because trial counsel had reasonable basis for not calling Dr. Blumberg as a witness. Chief Public Defender Michael Toms testified at the PCRA hearing

that there were some “holes” in the report where “we were going to be in trouble.” N.T., PCRA Hearing, 5/9/13 at 55. Counsel specifically addressed his concerns with information contained in the report pertaining to a PFA petition Cleary’s previous wife had filed against him. ***Id.*** at 47, 55. Counsel was also concerned that the report indicated that Cleary had received a medical discharge from the Air Force by faking a mental illness, when the defense was based upon mental illness. ***Id.*** at 55-56. Based upon the vulnerabilities exposed in Dr. Blumberg’s report, counsel chose not to present Dr. Blumberg as a witness. ***Id.*** at 56. As counsel clearly had a rational basis for his decision, Cleary’s claim of ineffective assistance in this regard fails.

Lastly, Cleary argues generally that counsel was ineffective for failing to investigate and/or call any defense witnesses. Appellant’s Brief at 15. We note, however, that this claim is not included in Cleary’s PCRA petition or in the concise statement of issues to be determined ordered by the PCRA court prior to the PCRA evidentiary hearing.<sup>3</sup> It is well settled that the “[f]ailure to state ... a ground [for relief] in the [PCRA] petition shall preclude

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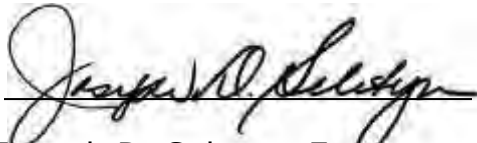
<sup>3</sup> As noted, the PCRA court initially held Cleary’s PCRA petition in abeyance pending his *nunc pro tunc* petition for allowance of appeal with the Pennsylvania Supreme Court. After the Supreme Court denied allocatur, the PCRA court, upon motion by the Commonwealth, ordered Cleary to file a “concise statement (not boilerplate)” of the specific allegations of error to be determined at the PCRA evidentiary hearing. Order, 3/13/13. Cleary filed his Concise Statement of Alleged Errors on April 15, 2013.

the defendant from raising that ground in any proceeding for post-conviction collateral relief.” Pa.R.Crim.P. 902(B). ***See also Commonwealth v. Elliott***, 80 A.3d 415, 430 (Pa. 2013). Accordingly, we are constrained to find this issue is waived.

Based on the foregoing, we agree with the PCRA court that Cleary’s allegations of ineffective assistance of counsel are wholly without merit. Accordingly, we find no error in the court’s order dismissing Cleary’s PCRA petition.

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: 7/24/2014