J-S35026-15

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. TERRELL DRUMMOND Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2932 EDA 2014

Appeal from the PCRA Order September 19, 2014
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006183-2010
CP-51-CR-0006184-2010

BEFORE: MUNDY, OLSON and PLATT,* JJ.

MEMORANDUM BY OLSON, J.: **FILED JULY 31, 2015**

Appellant, Terrell Drummond, appeals from the order entered on September 19, 2014 dismissing his first petition filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541-9546. Appellant's court-appointed counsel filed both a petition to withdraw as counsel and an accompanying brief pursuant to ***Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981), and its federal predecessor, ***Anders v. California***, 386 U.S. 738 (1967).[1] We conclude that Appellant's counsel complied with the

[1] Counsel seeking to withdraw from post-conviction representation must satisfy the requirements of ***Commonwealth v. Turner***, 544 A.2d 927 (Pa. 1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988) (*en banc*). However, "[b]ecause an ***Anders*** brief provides greater protection to a defendant, this Court may accept an ***Anders*** brief in lieu of a [brief pursuant to ***Turner/Finley***]." ***Commonwealth v. Widgins***, 29 A.3d 816, 817 n.2 (Pa. Super. 2011) (citation omitted).

* Retired Senior Judge assigned to the Superior Court

procedural requirements necessary to withdraw. Furthermore, after independently reviewing the record, we conclude that the appeal is without merit. We, therefore, grant counsel's petition to withdraw and affirm the order dismissing Appellant's PCRA petition.

This Court previously outlined the factual background of this case as follows:

> On March 10, 2010, at approximately 12:00 a.m., [17]-year-old Joseph Martin [("Martin")] was walking home after getting off the train at the Tiago station in Kensington. As he was walking, Martin heard someone behind him ask if he knew the time. After Martin turned around and said no, [A]ppellant pointed a gun at Martin and told him to get down on the ground. Martin complied, and [A]ppellant patted Martin down and took his leather jacket and handheld Sony PlayStation. Appellant asked Martin for money and Martin replied that he did not have any. Appellant then forced Martin at gunpoint to walk with him to Martin's home on Jasper Street, approximately two blocks away, where Martin retrieved [$20.00] from his mother and gave it to [A]ppellant. Appellant then fled southbound down Jasper Street, and Martin called the police. . . .
>
> Later that day, at approximately 5:45 p.m., [15]-year-old Shannon Lewis [("Lewis")] was walking from the Tiago train station to his home. As he was walking, he saw [A]ppellant across the street holding a silver handgun. Appellant approached Lewis and asked him, "Do I know you from somewhere?" [A]ppellant then told Lewis to get up against a wall. [A]ppellant took from Lewis a watch, an iPod, and [$40.00].

Commonwealth v. Drummond, 60 A.3d 860 (Pa. Super. 2012) (unpublished memorandum) at 2-3, *appeal denied*, 63 A.3d 1243 (Pa. 2013) (internal alterations, certain quotation marks, citation, and honorifics omitted).

The relevant procedural history of this case is as follows. On June 4, 2010, Appellant was charged via two criminal informations with 22 offenses including, *inter alia*, two counts of robbery[2] and two counts of possessing an instrument of crime.[3] The cases were consolidated and trial commenced on March 21, 2011. Appellant was convicted of two counts of robbery and two counts of possessing an instrument of crime. The remaining 18 charges were *nolle prossed*. On May 18, 2011, Appellant was sentenced to an aggregate term of 7½ to 20 years' imprisonment. Appellant appealed and this Court affirmed. ***See generally id.***

On February 21, 2014, Appellant filed the instant counseled PCRA petition. On June 9, 2014, the Commonwealth moved to dismiss the petition without an evidentiary hearing. ***See*** Pa.R.Crim.P. 907. On July 29, 2014, the PCRA court issued a Rule 907 notice. On September 19, 2014, the PCRA court dismissed Appellant's PCRA petition and appointed counsel to file the instant appeal. This timely appeal followed.[4]

In her ***Anders*** brief, counsel raised the following two issues:

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[2] 18 Pa.C.S.A. § 3701.

[3] 18 Pa.C.S.A. § 907.

[4] On October 14, 2014, the PCRA court ordered Appellant to file a concise statement of errors complained of on appeal. On November 4, 2014, counsel filed notice of her intent to seek to withdraw on appeal. ***See*** Pa.R.A.P. 1925(c)(4). The PCRA court, therefore, did not issue a Rule 1925(a) opinion.

1. [Was trial counsel ineffective for failing to object to the trial court's jury instruction given pursuant to ***Commonwealth v. Spencer***, 275 A.2d 299 (Pa. 1971)?

2. Was trial counsel ineffective for failing to object to the trial court's instruction regarding witness credibility?]

See generally Anders Brief at 7-15.

Prior to addressing the merits of the issues raised in counsel's ***Anders*** brief, we must determine whether she met the procedural requirements to withdraw as counsel. In order to withdraw in a PCRA proceeding, court-appointed counsel must file a letter (or in this case, brief) detailing (1) the nature and extent of her review of the record; (2) the issues the petitioner wished to be raised; and (3) the reasons those issues are meritless. ***See Commonwealth v. Pitts***, 981 A.2d 875, 876 (Pa. 2009). Additionally,

> PCRA counsel seeking to withdraw [must] contemporaneously forward to the petitioner a copy of the application to withdraw that includes (i) a copy of both the "no-merit" letter, and (ii) a statement advising the PCRA petitioner that, in the event the [] court grants the application of counsel to withdraw, the petitioner has the right to proceed *pro se*, or with the assistance of privately retained counsel.

Commonwealth v. Widgins, 29 A.3d 816, 818 (Pa. Super. 2011) (citation omitted). If counsel fulfills these procedural requirements, we must then independently review the record and determine whether the issues raised are indeed non-meritorious. In this case, counsel fulfilled the procedural

requirements for withdrawing as PCRA counsel.[5] Therefore, we turn to the two issues raised in counsel's ***Anders*** brief.

Both of Appellant's claims relate to the purported ineffectiveness of his trial counsel. Our Supreme Court has explained:

> [T]o prove counsel ineffective, [a PCRA] petitioner must demonstrate: (1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) the petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error. Counsel is presumed to have rendered effective assistance.
>
> A court is not required to analyze the elements of an ineffectiveness claim in any particular order of priority; instead, if a claim fails under any necessary element of the ineffectiveness test, the court may proceed to that element first. Finally, counsel cannot be deemed ineffective for failing to raise a meritless claim.

Commonwealth v. Tharp, 101 A.3d 736, 747 (Pa. 2014) (citations omitted).

First, Appellant argues trial counsel was ineffective for failing to object to the trial court's ***Spencer*** charge. We conclude that Appellant's underlying claim lacks arguable merit. "In reviewing a challenge to a jury instruction, the entire charge is considered, not merely discrete portions thereof. The trial court is free to use its own expressions as long as the concepts at issue

[5] Appellant did not file a response to PCRA counsel's ***Anders*** brief.

are clearly and accurately presented to the jury." ***Commonwealth v. Johnson***, 107 A.3d 52, 87–88 (Pa. 2014) (citations omitted).

In ***Spencer***, our Supreme Court addressed the proper course of action when a jury informs the court that it is deadlocked on at least one count. Our Supreme Court rejected the previously approved charge given pursuant to ***Allen v. United States***, 164 U.S. 492 (1896), as being too persuasive. ***Spencer***, 275 A.2d at 304. Instead, our Supreme Court endorsed giving the charge recommended by the American Bar Association. ***Id.*** at 305. That charge was incorporated into Pennsylvania State Standard Jury Instruction 2.09, which provides:

> The jury foreman has informed me that you are deadlocked.
>
> I remind you that, in order to return a verdict on any charge, you must agree unanimously on that specific charge.
>
> Each of you has a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to your individual judgment. However, each of you must decide this case for yourself after an impartial consideration of the evidence with your fellow jurors.
>
> While you should not hesitate to reexamine your own views and change your opinion if you are convinced that your opinion is erroneous, do not feel compelled to surrender your honest belief as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Pa.SSJI (Crim.) 2.09.

In this case, the trial court gave the following instruction:

> Ladies and gentlemen, you've been deliberating for awhile now and I can tell from your last note that you're having some difficulties resolving the issues raised in the case. So I'm going to give you some additional instructions now which I'm hopeful will help you to arrive at a verdict in this case.
>
> Let me start out by telling you something I do know all of you already know, I'm going to say this simply for emphasis. Ladies and gentlemen, getting a verdict in this case is a matter of extreme importance to everybody involved in this case. I'm talking about the Court, the Commonwealth, and the defense. And I'm sure you all understand that there would be a great deal of time, expense, and anxiety for everybody involved in this process should you not reach a verdict, which would require me to declare a mistrial and start this entire trial over from day one, okay.
>
> Nevertheless, no juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of fellow jurors or for the mere purpose of reaching a verdict. However, please keep in mind, that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if that can be done without violence to individual judgment.
>
> Each juror must decide the case for himself or herself, but only after there has been impartial consideration with all of your fellow jurors. In order to return a verdict, every juror must agree. Your verdict has to be unanimous, but please remember in the course of your deliberations that a juror should not hesitate to reexamine his or her own opinion if convinced that it is erroneous. I'm going to ask that you continue your deliberations.

N.T., 3/3/11, at 87-88. The trial court then explained to the jury that if it could not reach a verdict, it could help decide on its future deliberations schedule. ***See id.*** at 88-89.

Appellant argues that this instruction was flawed for four reasons. First, he argues that the instruction was flawed because the trial court stated

that the jury had a duty to come to an agreement. This, however, is a mischaracterization of the instruction. The instruction clearly states that the jury had a duty **to deliberate** in an attempt to reach an agreement. It does not state that the jury had a duty to reach a verdict. This sentence was taken verbatim from the Pennsylvania State Standard Jury Instructions. Furthermore, the Pennsylvania State Standard Jury Instructions took this sentence verbatim from the model endorsed by our Supreme Court. Thus, this statement by the trial court was entirely proper.

Next, Appellant argues that the instruction was flawed because it mentioned that it was important to reach a verdict. In addition, Appellant argues that the instruction was flawed because the trial court stated that it hoped the jury could reach a verdict. These two arguments, however, fail to recognize that this Court previously permitted such comments during a ***Spencer*** charge. In ***Commonwealth v. McCoy***, 279 A.2d 237 (Pa. Super. 1971) (*per curiam*), the trial court instructed the jury as follows: "I trust that you will find your task not one of which you are hopelessly divided. . . . Should you be unable to agree, as disappointing and undesirable as such disagreement might be. . . . Verdicts are very important in this case. . . it is highly desirable that you shall be of one mind." ***Id.*** at 239 (Spaulding, J. dissenting). This Court concluded that the charge was appropriate. ***See McCoy***, 279 A.2d at 237. The trial court's statements in the case *sub judice*

were less coercive than those in ***McCoy***. Thus, Appellant's second and third objections to the ***Spencer*** charge are without merit.

Finally, Appellant argues that the charge was flawed because the trial court referenced the costs associated with a retrial. This, however, ignores our Supreme Court's approval of a similar charge. In ***Commonwealth v. Gartner***, 381 A.2d 114 (Pa. 1977), the trial court, as part of its ***Spencer*** charge, stated:

> Let me say a few other things to you; that if you don't reach a decision in this case, the case will have to be tried over again at the next [t]erm of [c]ourt. And this, of course, would entail inconvenience for the Commonwealth and the defendants, some modest added expense to the [c]ounty.

Id. at 122 (citation omitted). Our Supreme Court held that "it was not reversible error to refer briefly to the inconvenience of a retrial which would be necessitated by failure to obtain a verdict." ***Id.*** at 123. Thus, Appellant's fourth objection to the trial court's ***Spencer*** charge is without merit.

Finally, when read as a whole, the trial court's ***Spencer*** charge

> did not begin to approach the substance of the supplemental ***Allen*** charge that [our Supreme] Court found to be potentially coercive in ***Spencer***. The trial court here . . . did not purport to separately address the jurors in the minority, nor did it suggest to jurors holding a minority view that they should defer to the majority view. . . . Rather, the trial court addressed the jury as a whole, and while repeatedly advising the jurors that they were not expected to surrender deeply-held views, reminded them of their duty and function, and directed them to continue to deliberate and to try to reach a verdict. In addition . . . the court did not pressure the jury to reach a verdict under pain of being inconvenienced[.]

Commonwealth v. Greer, 951 A.2d 346, 360 (Pa. 2008). "The supplemental instruction given here merely reflects the trial judge's neutral efforts to reach [a verdict] in this case." ***Commonwealth v. Edmondson***, 718 A.2d 751, 754 (Pa. 1998) (Nigro, J. concurring). Therefore, we conclude that all four of Appellant's objections to the ***Spencer*** charge lack arguable merit. Accordingly, Appellant's trial counsel was not ineffective for failing to object to the instruction.

In his second issue, Appellant claims that his trial counsel was ineffective for failing to object to the trial court's jury instruction regarding witness credibility. The trial court instructed the jury that:

> Now, as the judges of fact in this case, you folks are the sole judges of the credibility of the witnesses and their testimony. And this means that you must judge the truthfulness and the accuracy of each witness[']s testimony and decide whether to believe all or part or none of that testimony and the following are some of the factors that you may and should consider when judging credibility and deciding whether or not to believe testimony.
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> * * *
>
> **Fourth, did the witness testify in a convincing manner? How did he or she look, act, and speak while testifying? Was his or her testimony uncertain, confused, selfcontradictory or evasive?**

N.T., 3/3/11, at 46-47 (emphasis added).

Appellant argues that this instruction was pointless. The disputed portion of this instruction, highlighted above, was taken verbatim from the Pennsylvania State Standard Jury Instructions, which provides: "Did the

witness testify in a convincing manner? [How did [he] [she] look, act, and speak while testifying? Was [his] [her] testimony uncertain, confused, self-contradictory, or evasive?]" Pa.SSJI (Crim.) 4.17(1)(d). This instruction is not pointless. Instead, it reminds the jury of several factors to evaluate when determining witness credibility. Therefore, Appellant's claim lacks arguable merit. As Appellant's underlying claim lacks arguable merit, trial counsel was not ineffective for failing to object to this instruction.

In sum, we conclude that counsel fulfilled the procedural requirements to withdraw as counsel. The two issues raised in counsel's ***Anders*** brief are without merit. Our independent review of the record also confirms that there are no meritorious issues. Accordingly, we grant counsel's motion to withdraw as counsel and affirm the order dismissing Appellant's PCRA petition.

Motion to withdraw as counsel granted. Order affirmed.

Judge Platt joins this memorandum.

Judge Mundy concurs in the result.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015