

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JOHNATHAN RYAN SIMMONS

Appellant

No. 1381 WDA 2014

Appeal from the PCRA Order July 28, 2014
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0016775-2009
CP-02-CR-0016835-2009

BEFORE: PANELLA, J., JENKINS, J., and STRASSBURGER, J.*

CONCURRING MEMORANDUM BY JENKINS, J.: **FILED JULY 31, 2015**

I concur because, like the majority, I believe the order dismissing Simmons' PCRA petition should be affirmed. I write separately to respond to the learned dissent.

The dissent accurately observes how counsel's failure to ascertain that the crime was committed on a Tuesday and not a Saturday prejudiced Simmons' alibi defense. Judge Strassburger aptly notes that if an alibi witness is not aware of the day of the week on which the crime occurred, "the witness is less than useless." However, I join the majority because

* Retired Senior Judge assigned to the Superior Court.

Simmons failed to prove that counsel's error actually prejudiced the outcome of the proceedings.

This Court follows the **Pierce**¹ test adopted by our Supreme Court to review claims of ineffective assistance of counsel:

When a petitioner alleges trial counsel's ineffectiveness in a PCRA petition, he must prove by a preponderance of the evidence that his conviction or sentence resulted from 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. We have interpreted this provision in the PCRA to mean that the petitioner must show: (1) that his claim of counsel's ineffectiveness has merit; (2) that counsel had no reasonable strategic basis for his action or inaction; and (3) that the error of counsel prejudiced the petitioner-i.e., that there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. We presume that counsel is effective, and it is the burden of Appellant to show otherwise.

Commonwealth v. duPont, 860 A.2d 525, 531 (Pa.Super.2004) (internal citations and quotations omitted). The petitioner bears the burden of proving all three prongs of this test. **Commonwealth v. Meadows**, 787 A.2d 312, 319-320 (Pa.2001). "If an appellant fails to prove by a preponderance of the evidence any of the **Pierce** prongs, the Court need not address the remaining prongs of the test." **Commonwealth v. Fitzgerald**, 979 A.2d 908, 911 (Pa.2010) (citation omitted).

¹ **Commonwealth v. Pierce**, 527 A.2d 973 (Pa.1987).

Here, Simmons' counsel had no strategic basis for failing to discover that the crime was committed on a Tuesday, and actually asked the alibi witness and Simmons about the "Saturday" in question. **See** N.T., 1/12/2011, at 17, 34. However, Simmons did not establish that this error prejudiced the outcome of the proceedings. The PCRA court found:

While trial counsel did incorrectly state that the date in question was a Saturday, the totality of the record indicates [Simmons] has failed to show prejudice.

Prior to deliberations beginning, the parties stipulated in the presence of the jury that the date in question was, in fact, a Tuesday and that counsel had been mistaken in stating that it was a Saturday.

Thus, any perceived confusion on the part of petitioner or Anita Murrell, [Simmons'] witness at trial, by the jury was explained by this error and correction. Further, as [Simmons'] longtime girlfriend, the jury could have found Anita Murrell was a less than credible alibi witness, given her bias and interest in the outcome of the case.

Finally, the victim clearly and consistently identified [Simmons] as the perpetrator. Based on all of those circumstances or factors, [Simmons'] third claim is dismissed as he had failed to establish prejudice as a result of counsel's alleged error.

PCRA Court Opinion, filed February 10, 2015, at 11-12 (citation and internal citations to the record omitted).

Considering all of the evidence presented against Simmons, there was not a reasonable probability that, if counsel had not erred, the outcome of the proceeding would have been different. The victim in this case had a good opportunity to view Simmons and his gun before positively identifying

both of them. When officers arrested Simmons, he was carrying the gun that the victim remembered as being "old fashioned" and "dirty," and Officer Larry Langham described as "the oldest looking firearm I have ever been part of that we recovered." **See** N.T. 1/13/2011, at 50, N.T. 1/12/2011, at 9. Further, the victim and two officers testified that Simmons threatened the victim while in his presence at the CVS, although Simmons denied this and insisted everyone was lying. **See** N.T. 1/12/2011, at 58.

Additionally, Anita Murrell was not a reliable witness because she was Simmons' girlfriend and she did not tell officers about Simmons' whereabouts until October 18, 2010, over a year after the robbery. N.T., 11/12/2011, at 26. Thus, even if she had known the date of the crime, it is not likely the jury would have found her to be credible.

I agree with the trial court and the learned majority that Simmons failed to establish prejudice. Thus, I respectfully concur.

Judge Panella joins the Concurring Memorandum.