NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JOHNATHAN RYAN SIMMONS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA 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.*

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

Appellant, Johnathan Ryan Simmons, appeals from the PCRA[1] order entered July 28, 2014, by the Honorable Edward J. Borkowski, Court of Common Pleas of Allegheny County. We affirm.

The factual history of this matter is well known to the parties, so we rely upon the trial court's recitation of facts as set forth on pages 5-7 of the Pa.R.A.P. 1925(a) opinion dated September 26, 2014. Briefly, Simmons and a cohort robbed a "jitney driver" at gunpoint, who was able to escape from the vehicle. When police officers transported the victim to the police station a short time later, the victim recognized Simmons on the street as his

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* Retired Senior Judge assigned to the Superior Court.

[1] Post Conviction Relief Act, 42 Pa.C.S.A. § 9541 *et seq*.

assailant, but Simmons ran away and evaded capture. Several days later, the victim again observed Simmons on the street and Simmons was successfully arrested.

A jury convicted Simmons of robbery, robbery of a motor vehicle, terroristic threats, recklessly endangering another person, simple assault, criminal conspiracy, intimidation of witnesses, receiving stolen property, and two counts each of terroristic threats and carrying a firearm without a license. The trial court sentenced Simmons to an aggregate term of six to twelve years' incarceration. This Court affirmed Simmons's judgment of sentence on appeal. ***See Commonwealth v. Simmons***, 766 WDA 2011 (Pa. Super., filed Feb. 11, 2013) (mem. op.).

Simmons filed a timely *pro se* PCRA petition. The PCRA court appointed counsel who later filed an amended petition. Following an evidentiary hearing, the PCRA court denied Simmons's petition. This timely appeal followed.

Simmons raises the following issues for our review.

> I. Was it error for the PCRA [c]ourt to find Simmons's ineffective-assistance-of-counsel claim meritless when trial counsel built a defense around Simmons's medical condition but failed to properly investigate and present support for his assertions?
>
> II. Was it error for the PCRA [c]ourt to find Simmons's trial counsel effective when he failed to object to the Commonwealth's use of extrinsic evidence to rebut Simmons's testimony on cross-examination?

> III. Was it error for the PCRA [c]ourt to find Simmons's trial counsel effective where the presentation of Simmons's alibi witness was "incredible" and meaningless in the eyes of the jury…?

Appellant's Brief at 3.

"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. § 9543(a)(3). "[T]his Court applies a *de novo* standard of review to the PCRA court's legal conclusions." ***Commonwealth v. Spotz***, 18 A.3d 244, 259 (Pa. 2011) (citation omitted).

As this Court has repeatedly stated,

> [t]o plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective

> reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act.

Commonwealth v. Rykard, 55 A.3d 1177, 1189-1190 (Pa. Super. 2012) (citation omitted).

Simmons first argues that trial counsel was ineffective for failing to investigate and introduce "direct and specific testimony" regarding his scoliosis affliction. Simmons contends "the crux of trial counsel's defense strategy was that [he] could not have been the perpetrator of the crimes in question because [he] suffered scoliosis and was physically incapable of being the same suspect who ran from the police," and therefore, counsel's failure to investigate and present evidence of his medical condition resulted in prejudice. Appellant's Brief at 12.

Trial counsel presented evidence that Simmons suffered from scoliosis to the jury. As noted by the PCRA court, trial counsel "had the jury physically observe petitioner's alleged disability during the trial, and petitioner testified to the debilitating nature of his condition at trial." PCRA Court Opinion, 2/10/15 (citing N.T., Jury Trial, Morning Session, 1/12/11 at 37-38). We therefore find Simmons's claim that trial counsel was ineffective for failing to introduce this evidence is without merit.

We further observe that, despite Simmons's allegation that trial counsel was ineffective for failing to present expert medical testimony demonstrating the severity of his scoliosis, Simmons fails to support his claim with proof that any such evidence exists or existed. Without reviewing such evidence, we cannot determine that this more specific claim is of

arguable merit, or that Simmons suffered any prejudice because of counsel's alleged failure to introduce expert testimony. Accordingly, this claim fails for that additional reason.

Simmons next argues that trial counsel was ineffective for failing to object to the Commonwealth's use of his prior burglary arrest for impeachment purposes. At trial, Simmons denied having been arrested or charged with a crime prior to this incident. ***See*** N.T., Jury Trial, Morning Session, 1/12/11 at 47. The Commonwealth proceeded to introduce evidence of Simmons's prior 2009 arrest for burglary in order to impeach his testimony. ***See id***.

Even if we assume Simmons' claim has arguable merit, Simmons cannot establish prejudice. After discussion with trial counsel, the trial court instructed the jury prior to closing arguments to "disregard [the evidence of Simmons's prior arrest for burglary] in the sense you are to draw absolutely no adverse inference as to even the purported arrest for burglary charge." N.T., Jury Trial, 1/11/15-1/13/15 at 97. "Pennsylvania law presumes the jury has followed the trial court's instructions." ***Commonwealth v. Bardo***, 105 A.3d 678, 714 (Pa. 2014). As such, Simmons's claim fails as the trial court's instruction cured any potential resulting prejudice.

Lastly, Simmons argues that counsel was ineffective for failing to adequately prepare and present an alibi defense. Specifically Simmons alleges that his "alibi witness stated that the day in question was Saturday, when in fact it was Tuesday." Appellant's Brief at 21. Although Simmons

does not provide the alibi witness's name or even a citation to the record where the misstatement allegedly occurred, this claim is baseless. Prior to jury deliberations, the parties stipulated in the presence of the jury that the robbery occurred on a Tuesday, and not a Saturday, thereby ameliorating any potential confusion caused by the witness's alleged misstatement. ***See*** N.T., Jury Trial, 1/12/11 at 102-103. Therefore, Simmons fails to establish that any prejudice resulted from counsel's perceived misconduct.

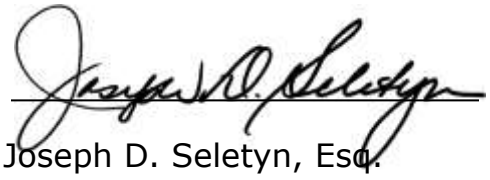
Based on the foregoing, we find Simmons's claims of ineffective assistance of counsel to be wholly without merit. Accordingly, we find no error in the PCRA court's order dismissing Simmons's petition.

Order affirmed.

Judge Jenkins files a concurring memorandum in which Judge Panella joins.

Judge Strassburger files a dissenting memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015